Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1895

ALLIED CHEMICAL CORPORATION, ET AL.,
Petitioners,

v.

DAIFLON, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN S. ATHENS
DOUGLAS L. INHOFE
CONNER, WINTERS, BALLAINE, BARRY & MCGOWEN
2400 First National Tower
Tulsa, Oklahoma 74104
Attorneys for Petitioner
Allied Chemical Corporation

COLEMAN HAYES
MONNET, HAYES, BULLIS, THOMPSON & EDWARDS
1719 First National Center West
Oklahoma City, Oklahoma 73102

HERBERT DYM
JOHN P. RUPP
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner
E. I. du Pont de Nemours and Company

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

JAMES M. STURDIVANT
SIDNEY G. DUNAGAN
GABLE, GOTWALS, RUBIN, FOX,
JOHNSON & BAKER
2010 Fourth National Bank Building
Tulsa, Oklahoma 74119
Attorneys for Petitioners
Kaiser Aluminum & Chemical Sales, Inc., and Kaiser Aluminum & Chemical Corporation

PETER B. BRADFORD
MCAFEE & TAFT
Fifth Floor
100 Park Avenue
Oklahoma City, Oklahoma 73102

HENRY KOLOWRAT
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania 19102
Attorneys for Petitioner
Pennwalt Corporation

J. L. WEIGAND, JR.
CURFMAN, HARRIS & WEIGAND
830 First National Bank Building
Wichita, Kansas 67202
Attorney for Petitioner
Racon Incorporated

D. KENT MEYERS
CROWE, DUNLEVY, THWEATT,
SWINFORD, JOHNSON & BURDICK
1700 Liberty Tower
100 Broadway
Oklahoma City, Oklahoma 73102
Attorney for Petitioner
Union Carbide Corporation

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

PROCEEDINGS IN THE TRIAL COURT 4

PROCEEDINGS IN THE COURT OF APPEALS 7

FURTHER PROCEEDINGS IN THE DISTRICT COURT AND COURT OF APPEALS 11

REASONS FOR GRANTING THE WRIT 13

The Decision in This Case Conflicts With Decisions of This Court and Other Courts of Appeals on the Important Question of the Standards Governing Mandamus 14

CONCLUSION 28

TABLE OF AUTHORITIES

CASES:

Atlantic Coast Railroad Co. v. *Sonenshine*, 226 F.2d 220 (4th Cir. 1955) 20

Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176 (1955) 15

Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379 (1953) 16, 19

Bigert v. *Goodyear Tire & Rubber Co.*, 361 F.2d 317 (2d Cir. 1966) 20

Catlin v. *United States*, 324 U.S. 229 (1945) 15

Page

Cobbledick v. *United States*, 309 U.S. 323 (1940) 15

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 15

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) ... 15

Daiflon, Inc. v. *Allied Chemical Corp.*, 534 F.2d 221 (10th Cir.), *cert. denied*, 429 U.S. 886 (1976) 4

Dassinger v. *South Central Bell Telephone Co.*, 537 F.2d 1345 (5th Cir. 1976) 14

De Beers Consolidated Mines, Ltd. v. *United States*, 325 U.S. 212 (1945) 16

De Pinto v. *Provident Security Life Insurance Co.*, 323 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964) 15

Eady v. *Foerder*, 381 F.2d 980 (7th Cir. 1967) 15

Evans v. *Calmar Steamship Co.*, 534 F.2d 519 (2d Cir. 1976) 15

Fairmont Glass Works v. *Cub Fork Coal Co.*, 287 U.S. 474 (1933) 14

General Motors Corp. v. *Lord*, 488 F.2d 1096 (1978) .. 20

Grace Lines, Inc. v. *Motley*, 439 F.2d 1028 (2d Cir. 1971) 19

In re United States, 598 F.2d 233 (D.C. Cir. 1979) 20

Kanatser v. *Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953) 19

Kerr v. *United States District Court*, 426 U.S. 394 (1976) 19

La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957) 9

Montgomery Ward & Co. v. *Duncan*, 311 U.S. 243 (1940) 14

Pat Ryan and Associates, Inc. v. *Du Pree* 17 F.R. Serv. 2d 86 (4th Cir. 1973) 20

Pellagrino v. *Ford Motor Co.*, 424 F.2d 241 (6th Cir. 1970) 15

Page

Peterman v. *Chicago, Rock Island & Pacific Railroad Co.*, 493 F.2d 88 (8th Cir.), *cert. denied*, 417 U.S. 947 (1974) 19

Platt v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964) 26, 27

Richardson v. *Communications Workers of America*, 469 F.2d 333 (8th Cir. 1972), *cert. denied*, 414 U.S. 818 (1973) 15

Southern Pacific Co. v. *United States District Court*, 190 F.2d 735 (9th Cir. 1951) 20

Thorn v. *Parkland Chevrolet Co.*, 416 F.2d 95 (4th Cir. 1969) 20

United States v. *Duell*, 172 U.S. 576 (1899) 16

United States v. *Smith*, 331 U.S. 469 (1947) 19

Will v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978) 9, 16, 17, 18

Will v. *United States*, 389 U.S. 90 (1967) 16, 18, 24

STATUTES AND RULES:

15 U.S.C. § 1 3

15 U.S.C. § 2 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 16

28 U.S.C. § 1292(b) 15, 18

28 U.S.C. § 1651(a) 8

Rule 50(b), Federal Rules of Civil Procedure 19

Rule 52(a), Federal Rules of Civil Procedure 22

Rule 10(d), Federal Rules of Appellate Procedure ... 7, 8

MISCELLANEOUS:

5A Moore, *Federal Practice* § 52.08 (1979-80 Supp.) .. 22

11 Wright & Miller, *Federal Practice and Procedure* (1973)

Section 2806 26

Section 2818 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

ALLIED CHEMICAL CORPORATION, ET AL.,
Petitioners,

v.

DAIFLON, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners [1] request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 612 F.2d 1249 and is reprinted in Appendix A to this

---

[1] Petitioners are Allied Chemical Corporation, E. I. du Pont de Nemours & Company, Kaiser Aluminum & Chemical Sales, Inc., Kaiser Aluminum & Chemical Corporation, Pennwalt Corporation, Racon Incorporated and Union Carbide Corporation.

petition.[2] The Court of Appeals' judgment and writ of mandamus appears in Appendix B. The Court of Appeals vacated in part the order of the United States District Court for the Western District of Oklahoma (Bohanon, J.), granting petitioners'[3] motion for a new trial. The trial court's "rulings and comments on [petitioners'] motions for judgment n.o.v. and for a new trial," which has not been reported, is appended to the opinion of the Court of Appeals and is reprinted in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1979 (Pet. App. B). On March 5, 1980, the Court of Appeals entered an order denying a timely petition for rehearing and suggestion for rehearing en banc (Pet. App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The district court granted petitioners' motion for a new trial in this case on unexceptionable and traditional grounds—that petitioners had been deprived of a fair trial and that the jury's damage award was grossly excessive. Despite the discretionary nature of this action, the Court of Appeals thereafter issued a writ of mandamus overturning the new trial order and reinstating the verdict as to liability. In so doing, the Court of Appeals held that an appellate court is au-

---

[2] The appendices are bound separately in a companion volume, which is referred to herein as "Pet. App."

[3] Petitioners were the defendants in the trial court.

thorized to determine on mandamus whether a new trial order represents an abuse of discretion—the same standard that applies on appeal. The question presented is as follows:

Whether the Court of Appeals erred in issuing a writ of mandamus, overturning an order granting a new trial and reinstating a jury verdict as to liability, on the asserted ground that the district court abused its discretion in entering the new trial order.

STATUTORY PROVISIONS INVOLVED

This case involves the All Writs Act, 28 U.S.C. § 1651 (a), and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. They are reprinted in Appendix F.

STATEMENT OF THE CASE

This petition arises from a private antitrust suit brought by respondent, Daiflon, Inc. ("Daiflon"), against petitioners, the domestic manufacturers of refrigerant gas. Daiflon, an importer of refrigerant gas, brought this action under Sections 1 and 2 of the Sherman Act, claiming that petitioners had entered into a conspiracy to drive it out of business and that petitioner Du Pont, completely apart from the alleged conspiracy, had monopolized and attempted to monopolize a portion of the refrigerant gas industry. Petitioners disputed Daiflon's claims and contended, in addition, that Daiflon's failure was caused by Daiflon's unique operating problems and by governmental action—the imposition in August 1971 of a 10 percent surcharge on imports[4] and the subsequent devaluation of the dollar as against the Japanese yen.

---

[4] Shortly after this surcharge was imposed, Daiflon's president informed Daiflon's Japanese supplier that the surcharge would

Proceedings in the Trial Court

The complaint in this case, which was amended on three separate occasions, was accompanied by extensive discovery.[5] As the case progressed toward trial, the district court entered a series of pretrial orders requiring the parties to exchange documents they intended to offer at trial and to identify by page and line number the deposition testimony they intended to read to the jury. At the final pretrial conference, held at the end of the week preceding commencement of the trial, the district court expressed dissatisfaction with Daiflon's compliance with the pretrial orders. The court noted that Daiflon had failed, despite repeated urgings by the defendants and the express requirements of the pretrial orders, to inform the defendants of the documentary and deposition evidence it intended to offer at trial. Tr. of March 2, 1979, pp. 47-48.

The case was tried before a jury in March 1979. Although the trial court expressed serious reservations concerning the merits of Daiflon's case, it denied petitioners' motions for a directed verdict at the close of Daiflon's case-in-chief and at the close of all the evidence, and submitted the case to the jury. The Special

---

have a "disastrous" effect on Daiflon's importing business. Thereafter, Daiflon did not place any orders for refrigerant gas with its suppliers.

[5] On September 3, 1974, the trial court dismissed the action because of Daiflon's persistent refusal to provide adequate answers to an interrogatory asking for its operating costs, a matter of great importance in this case. The trial court's dismissal was reversed by the Court of Appeals. Daiflon, Inc. v. Allied Chemical Corp., 534 F.2d 221 (10th Cir.), *cert. denied*, 429 U.S. 886 (1976).

Verdict returned by the jury on March 30, 1979, found against all of the petitioners. Specifically, the jury purported to find by a preponderance of the evidence that petitioners had conspired with each other in violation of the antitrust laws; that Du Pont's share of the relevant market during the relevant period exceeded 50 percent; that Du Pont willfully and unlawfully had acquired and attempted to acquire monopoly power; and that, as a consequence of all of these unlawful acts, Daiflon had suffered damages before trebling in the amount of $2,500,000.

Petitioners thereafter filed timely motions for judgment notwithstanding the verdict and, alternatively, for a new trial. The memorandum in support of the motion for judgment n.o.v. argued that Daiflon had failed to adduce substantial evidence of a conspiracy among any or all of the petitioners or of monopolization or attempted monopolization by Du Pont. The memorandum also pointed out that the undisputed evidence showing that Du Pont accounted for only 40 percent of the sales in the relevant market precluded, as a matter of law, a verdict in Daiflon's favor on the individual monopolization claims. Petitioners also noted that there had been a complete failure of proof as to damages, much less any evidence supporting the jury's award of $2,500,000. Finally, in the memorandum in support of the motion for a new trial, petitioners demonstrated additionally that a number of events at trial, including the receipt into evidence of a mass of inadequately qualified and otherwise inadmissible documents, had deprived them of a fair trial.[6]

---

[6] The memoranda submitted by petitioners in support of their motions for judgment n.o.v. and for a new trial are reproduced in the separate Appendix being filed with this petition (*see* Pet. App. G and H).

On May 14, 1979, following receipt of a responsive memorandum on behalf of Daiflon, the trial court heard oral argument in connection with the motions for judgment n.o.v. and for a new trial. At the conclusion of the oral argument, the court denied the motion for judgment n.o.v. and granted the motion for a new trial.

The court prefaced its comments on the motions by stating that "[t]he Court has one object and only one object, and that is to see that the parties have a fair trial. No other object, no other interest, and no other concern." App. A, p. 23a. The court then explained that Daiflon's failure to comply with pertinent provisions of the pretrial orders had substantially prejudiced petitioners. *Id.* at 24a. The court also observed that, because of Daiflon's noncompliance with the pretrial orders, serious error had occurred with respect to the admission of certain exhibits. *Id.* at 27a-28a.

The court then turned to the matter of damages, stating that it "was shocked when the verdict was read of $2,500,000 * * *." *Id.* at 28a. As the court explained:

> "[G]enerally Daiflon was insignificant; and the Japanese treatment by this country, the surtax, and the exchange of the dollar—this had a tremendous amount of effect upon what happened to the plaintiff.
>
> "* * * If you consider the earnings, 1969, 1970, 1971, there is no basis upon these earnings by the company to project that they lost $2,500,000." * * * *Id.* at 26a.

As a means of dealing with the problems that had occurred at trial, the court indicated that it would entertain requests for further discovery and outlined

a method for resolving evidentiary disputes, to the extent possible, prior to the retrial. *Id.* at 27a. Finally, the court observed generally with respect to the new trial motion:

> "The Court finds that there was not a fair trial, and this Court has a duty to see that there is a fair trial. The Court has no love for the defendants and no love for the plaintiff[ ] in this case, but there was not a fair trial, say from beginning to end." *Id.* at 25a.

Proceedings in the Court of Appeals

On May 25, 1979, Daiflon requested the Court of Appeals to issue a writ of mandamus directed to Judge Bohanon instructing him to reinstate the jury verdict. After receiving petitioners' response[7] and a reply from Daiflon, the Court of Appeals entered an order directing the parties "to prepare and sign a narrative statement of the case along the lines provided in Rule 10(d) of the Rules of Appellate Procedure," with each side to "prepare a summary of the evidence presented by it at the trial."[8] App. D, pp. 32a-33a. The stated purpose of the order was to permit the Court of Appeals "to judge the exercise of discretion on the part of the trial judge * * *." *Id.* at 32a.

In the introduction to their narrative statements, submitted in response to this order, petitioners urged

---

[7] Judge Bohanon, the nominal respondent in the Court of Appeals, advised the court that he would not make any appearance in the case.

[8] Rule 10(d) provides that a statement of the case that is prepared jointly by the parties, conforms to the truth, and is approved

that mandamus is not available to review a discretionary determination by a trial court. In addition, petitioners advised the court by letter that they did not agree that the narrative statements, which had been prepared by the parties individually rather than jointly and had not been approved by the trial judge (as required by Rule 10(d)), could be utilized as a substitute for the trial record.[9]

The Court of Appeals issued its judgment and writ of mandamus on December 21, 1979. It directed the district court to restore the verdict of the jury as to liability, while permitting the court to proceed with a new trial on damages.

In its accompanying opinion, the Court of Appeals acknowledged that an appeal does not lie from an order granting a new trial and stated that the "primary question in the case is whether * * * an extraordinary writ [28 U.S.C. § 1651(a)] can be employed to review the validity of the order of the trial court granting a new trial." *Id.* at 5a-6a. The court then considered opinions of this Court governing the availabil-

---

by the trial court, may be used as the record on appeal, in lieu of the papers and exhibits filed in the district court and the transcript of proceedings in that court.

[9] Petitioners' narrative statement set forth the facts relating to the reasons advanced by the trial court for granting petitioners' motion for a new trial—that the damage award was excessive and that petitioners were deprived of a fair trial. Since, in requesting the writ, Daiflon had not urged the Court of Appeals to review liability issues, these issues were not addressed in petitioners' narrative statement, although the Court of Appeals was referred to petitioners' post-trial motions and memoranda, which were appended to petitioners' answer to Daiflon's petition. *See* Pet. App. G and H. These memoranda set forth petitioners' position on the liability issues as well as on other issues presented at the trial.

ity of mandamus, concluding with this analysis of *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978):

> "Plain abuse of discretion or abuse of power which add up to mere erroneousness was said not to furnish a basis for interlocutory review by writ. Justice Blackmun specially concurred in the Rehnquist opinion. The Burger, Brennan, Marshall and Powell dissent maintained that the clear abuse of discretion standard set forth in *La Buy* [v. *Howes Leather Co.*, 352 U.S. 249 (1957)] was still a valid basis for issuance of a writ of mandamus.
>
> "Granted that erroneousness does not constitute a valid ground for issuance of the writ. Nevertheless, it cannot be said that the clear abuse of discretion standard is repudiated." *Id.* at 10a.

After thus having adopted a "clear abuse of discretion" standard for review on mandamus, the Court of Appeals turned to the reasons advanced by the trial court for ordering a new trial. As to the trial court's determination that petitioners had been deprived of a fair trial, the Court of Appeals apparently believed that the determination was based on the trial court's observations concerning the jury's lack of comprehension of the issues. The trial court's view of the significance of Daiflon's noncompliance with the pretrial orders, requiring an exchange of documentary and deposition evidence, was discounted by the Court of Appeals. *Id.* at 18a-19a. Similarly, the Court of Appeals refused to credit the trial court's determination that it had erred in receiving exhibits, because "the judge does not specify as to which of these were improperly received and there is no way to ascertain this." *Id.* at 19a.

The Court of Appeals also stated, as to liability, that the trial judge "indicated his belief that it was established. If he had doubts about this, he would have granted the defendants' motion for judgment notwithstanding the verdict." *Id.* at 19a. Although there was no record before it and the liability issues had not been briefed or argued, the Court of Appeals stated that "this is not a case in which the evidence to establish liability is vague and questionable." *Id.* at 19a-20a.

Finally, the Court of Appeals reluctantly upheld the trial court's order to the extent that it granted a new trial on damages. The Court of Appeals stated that the damage issue is one of fact whereas liability involves questions of law and, therefore, that the district court had more discretion on damage questions. *Id.* at 21a. As the Court of Appeals said, "the trial court did hear the evidence in its entirety and hence it is in a much better position to judge this issue than is an appellate court." *Id.* at 20a.

Petitioners filed a timely petition for rehearing and suggestion for rehearing en banc. Among other things, the petition brought to the attention of the Court of Appeals the fact that it had erred in concluding that the trial court had no reservations concerning the strength of Daiflon's case on liability. The petition urged that, if the writ of mandamus were not denied, at the very least the matter should be remanded to afford the trial court an opportunity to provide a full statement of its views on all of the grounds advanced by petitioners in their motion for a new trial, including their contention that the jury's verdict on liability was contrary to the weight of the evidence and otherwise was flawed.

The petition for rehearing was denied by the Court of Appeals in a pro forma order entered on March 5, 1980 (Pet. App. C).

Further Proceedings in the District Court and Court of Appeals

Shortly after the Court of Appeals denied the petition for rehearing and suggestion for rehearing en banc, Daiflon, in a letter to the trial court, stated "the position of the plaintiff" that "the Court's impartiality may reasonably be questioned" and suggested the appropriateness of the court's voluntary recusal from further proceedings. Following the receipt of a letter from petitioners, the trial court entered an order on April 7, 1980, withdrawing from the case.

The trial court made clear in its April 7 order that it was not withdrawing because of "any feelings of prejudice or interest," charges that the court rejected in its order. Pet. App. E, p. 37a. Rather, the court's withdrawal was based solely on its judgment that it could not in good conscience retry the case in accordance with the mandate of the Court of Appeals. As the court explained:

> "The trial court saw and heard all the evidence (approximately four weeks of trial) and had a clear understanding of the evidence and issues before the jury; based upon what the trial court knew, it had to, in honesty, grant defendants' motion for new trial as to all issues. The court unequivocally stated that to permit the verdict to stand and not grant a new trial, the court would be dishonest and cowardly. What more can a judge say regarding his feeling that a new trial was required? The court observed that if it did not grant a new trial, it would have been exceedingly lazy. What more can a judge say to show his feeling

that a new trial was essential for justice to be done in this case?

* * *

"Nor can the court candidly state that its refusal to grant defendants a judgment notwithstanding the verdict * * * should be considered any proof of the liability of the defendants, as urged by the circuit court.

* * *

"If this court were to retry the cause on the basis of the mandate, for the reasons hereinbefore stated, it could not be satisfied with the result. The court is passionately convinced that the issue of liability has not been proven, though there exists some evidence otherwise. Further, any verdict of damages must be founded upon a totality of the evidence—including that evidence bearing upon the question of liability." *Id.* at 35a-36a.

Following receipt of this order, petitioners moved in the Court of Appeals for leave to file a second petition for rehearing and suggestion for rehearing en banc. In the rehearing petition attached to that motion, petitioners noted that the sole basis for reinstatement of the liability verdict was the Court of Appeals' view that "as far as liability is concerned the judge indicated his belief that it was established." Pet. App. A, p. 19a. Petitioners pointed out that in view of the trial court's statement in its April 7 order that "the issue of liability has not been proven" in this case, there is no basis for reinstatement of the jury's verdict as to liability.[10]

---

[10] Petitioners' motion for leave to file a second petition for rehearing and suggestion for rehearing en banc has not yet been ruled upon by the Court of Appeals. In the unlikely event the Court of Appeals has not disposed of the second rehearing petition before this Court otherwise is prepared to act on this petition, this Court may of course delay consideration of the petition until the

REASONS FOR GRANTING THE WRIT

The procedural posture of this antitrust case prior to the intervention of the Court of Appeals was hardly unique or extraordinary. An experienced trial judge, who had lived with this case throughout its pretrial phase and presided over a four-week jury trial, had granted petitioners a new trial on entirely appropriate and traditional grounds—that petitioners had been deprived of a fair trial and that the jury's damage award had been grossly excessive.

What makes this case extraordinary and significant, and worthy of this Court's attention, is the Court of Appeals' review, by way of mandamus, of the trial court's order granting a new trial for the purpose of determining whether that court abused its discretion. In so doing, the Court of Appeals undermined the previously well-settled, black-letter proposition that a new trial order is interlocutory in nature and not appealable under the final judgment rule. The Court of Appeals' opinion in this case invites litigants dissatisfied with trial court rulings on motions for a new trial—indeed, dissatisfied with any of the host of interlocutory rulings made routinely by trial courts—to seek immediate review of those rulings in the courts of appeals. This use of the writ of mandamus, to review a discretionary determination of a trial court, is in direct conflict with decisions of this Court and of other courts of appeals announcing and applying rigorous criteria to govern mandamus.

In fact, the decision in this case illustrates dramatically the dangers of permitting appellate courts to review on mandamus interlocutory orders, such as

---

Court of Appeals has reached a decision on the pending motion and second rehearing petition.

orders granting a new trial. In traditional appellate proceedings, there would be a full record before the Court of Appeals and briefing and argument of all issues tendered by the parties. None of these safeguards to measured and careful consideration of the issues was present in this extraordinary mandamus proceeding. As a result, the Court of Appeals' reinstatement of the jury's verdict as to liability rests upon a demonstrably incorrect assumption concerning the district court's views on liability. At the same time, the Court of Appeals' opinion contains numerous misstatements with respect to the evidence at trial on the liability issues. These misstatements were all but inevitable given the fact that the Court of Appeals did not have before it in this extraordinary proceeding a single page of the trial transcript or any but a handful of the hundreds of documents that were admitted into evidence. In refusing to remand this case to the district court for a fuller statement of that court's views on liability, the Court of Appeals improperly invaded the province of the district court, effectively precluded that court from exercising its discretion on issues raised in petitioners' post-trial motions, and reached a decision that is untenable as a matter of fact and law.

The Decision in This Case Conflicts With Decisions of This Court and Other Courts of Appeals on the Important Question of the Standards Governing Mandamus

1. It is settled, of course, that an order granting a new trial is interlocutory in nature and therefore is not immediately appealable.[11] This settled rule reflects

---

[11] The cases so holding are legion. *E.g.*, Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 253 (1940); Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-85 (1933); Dassinger v.

a fundamental policy decision that has been made by Congress,[12] and endorsed repeatedly by this Court,[13] that in all but the most exceptional of circumstances the benefits that may be realized in permitting piecemeal review are far outweighed by the attendant costs —measured in terms of expense to the litigants, delay in concluding litigation on its merits, and the inevitable drain on scarce judicial resources.

In view of the important policies embodied in the final judgment rule, this Court has been at pains to caution appellate courts against permitting mandamus

---

South Central Bell Telephone Co., 537 F.2d 1345, 1346 (5th Cir. 1976) (per curiam); Evans v. Calmar Steamship Co., 534 F.2d 519, 522 (2d Cir. 1976); Richardson v. Communications Workers of America, 469 F.2d 333, 334-35 (8th Cir. 1972) (per curiam) *cert. denied*, 414 U.S. 818 (1973); Pellagrino v. Ford Motor Co., 424 F.2d 241, 242 (6th Cir. 1970) (per curiam); Eady v. Foerder, 381 F.2d 980, 981 (7th Cir. 1967); De Pinto v. Provident Security Life Insurance Co., 323 F.2d 826, 838 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); 11 Wright & Miller, *Federal Practice and Procedure* § 2818 (1973), and cases discussed therein.

[12] Congress has, of course, carved out a limited exception to the final judgment rule in 28 U.S.C. § 1292(b). Respondent did not even attempt to use 28 U.S.C. § 1292(b)—which requires the consent of the trial judge and of the Court of Appeals—to obtain immediate appellate review of the district court's order granting a new trial. *See* Pet. App. A, p. 6a.

[13] *E.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Catlin v. United States, 324 U.S. 229 (1945); Cobbledick v. United States, 309 U.S. 323 (1940); *see also* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181-82 (1955).

This Court approved in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), a narrow exception to the final judgment rule. Because of its carefully limited nature, there is no reported instance of a new trial order being reviewed under the *Cohen* exception.

to be used as a substitute for appeal. Thus, this Court has emphasized that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify invocation of this extraordinary remedy." *Will* v. *United States,* 389 U.S. 90, 95 (1967) (quoting from *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212 (1945)). The burden of establishing that "exceptional circumstances" exist rests, of course, upon the petitioner, who must show "that its right to issuance of the writ is 'clear and indisputable,'" *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 384 (1953) (quoting from *United States* v. *Duell,* 172 U.S. 576 (1899)).

One of the major vices of the present decision is that, while paying lip service to these basic principles, the Court of Appeals has fashioned in this case an entirely new standard to govern review on mandamus. The Court of Appeals acknowledged here that "an orthodox appeal pursuant to § 1291 of the Judicial Code [28 U.S.C. § 1291] is not a possibility because * * * [t]he grant of a new trial is not a final judgment." Pet. App. A, p. 6a. The court also recognized that the district court's new trial order was in response to a timely motion for a new trial, and had been based upon grounds urged in that motion, so that this is not a case of the trial court's acting beyond its prescribed jurisdiction. *Id.* at 7a. The court proceeded nevertheless to overturn the new trial order pursuant to a curiously formulated "abuse of discretion" standard—a standard that it endeavored to justify by means of the plurality and dissenting opinions in *Will* v. *Calvert Fire Insurance Co.,* 437 U.S. 655 (1978).

According to the Court of Appeals, the plurality opinion in *Will* v. *Calvert Fire Insurance* simply reaffirms the proposition that "[p]lain abuse of discretion or abuse of power which add up to mere erroneousness" do not provide a basis for mandamus. Pet. App. A, p. 10a. The court then went on to construe the dissenting opinions in the case as endorsing an "abuse of discretion" standard on mandamus, and attempted to harmonize that standard with the plurality opinion (*id.* at 10a-11a):

> "Granted that erroneousness does not constitute a valid ground for issuance of the writ. Nevertheless, it cannot be said that the clear abuse of discretion standard is repudiated. So, therefore, if it is found that there is disregard for proper procedure, or misuse of judicial power in the trial judge's conduct, this would constitute clear abuse of discretion."

It is difficult to conceive of a standard for mandamus with more potential for abuse and inconsistent decision-making, or posing a greater threat to the final judgment rule, than the standard fashioned by the Court of Appeals in this case. That standard is made all the more alarming by the fact that the Court of Appeals' opinion in this case is the first purportedly comprehensive analysis by an appellate court of the law governing mandamus since this Court's decision in *Will* v. *Calvert Fire Insurance.* If the decision in this case is permitted to stand, litigants in the Tenth Circuit, if not elsewhere, will be able to obtain immediate appellate review of orders granting a new trial by the simple expedient of casting their arguments in terms of an abuse of discretion by the trial court. Review by this Court is warranted to prevent the ob-

vious damage this license would entail to the final judgment rule.[14]

2. Review by this Court also is warranted because, in fact, the Court of Appeals' decision in this case is in direct conflict with decisions of this Court and other courts of appeals on the important question of the standards governing mandamus. Fairly read, *Will* v. *Calvert Fire Insurance* does not support use of an "abuse of discretion" standard on mandamus. Indeed, Mr. Justice Rehnquist referred pointedly in that case to the "dangers" of issuing a writ of mandamus "upon a mere showing of abuse of discretion * * *." 437 U.S. at 665 n. 7. This Court's decision in *Will* v. *United States, supra,* is to the same effect; the Court there vacated the writ that had been issued because of the discretionary nature of the underlying order and, at the same time, emphasized that (389 U.S. at 98 n. 6)—

> "[c]ourts faced with petitions for the peremptory writs must be careful lest they suffer themselves

---

[14] The damage to the final judgment rule caused by the Court of Appeals' decision in this case obviously is not limited to situations involving the award of a new trial. Prior to the decision in this case, immediate appellate review was available only for the "small class" of interlocutory orders falling within the collateral order doctrine and for orders meeting the rigorous criteria established by Congress in 28 U.S.C. § 1292(b). *See* notes 12 and 13 *supra.* The decision in this case threatens to engulf these narrow, carefully structured exceptions to the final judgment rule. If litigants dissatisfied with new trial orders are permitted to obtain immediate appellate review under an abuse of discretion standard, there is no principled way to deny litigants dissatisfied with other interlocutory orders a comparable opportunity to convince an appellate court that the order represents an abuse of discretion. This provides yet another compelling justification for review of the present decision by this Court.

> to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. * * *'' [15]

Prior to the decision in the present case, litigants rarely attempted to use the All Writs Act to obtain immediate appellate review of new trial orders. This undoubtedly is attributable to the fact that the award of a new trial inevitably involves a large element of discretion—so that rarely if ever can it be said that a litigant's right to issuance of the writ to overturn a new trial order, on other than jurisdictional grounds, is "clear and indisputable." *Bankers Life & Casualty Co.* v. *Holland, supra,* 346 U.S. at 384.[16] Indeed, this is the first case, since the All Writs Act was enacted, in

---

[15] *See also* Kerr v. United States District Court, 426 U.S. 394, 403 (1976) ("A judicial readiness to issue a writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by [the] judgment of Congress" embodied in the final judgment rule.).

[16] The extent to which the decision in this case departs from and conflicts with previously settled law is illustrated by the fact that the Court of Appeals was able to identify only three cases in which mandamus has been used to overturn a new trial order. Pet. App. A, p. 14a-15a. In two of those cases, the trial court had lacked jurisdiction to order a new trial—and the orders were vacated on that basis. Peterman v. Chicago, Rock Island & Pacific Railroad Co., 493 F.2d 88 (8th Cir.), *cert. denied,* 417 U.S. 947 (1974); Kanatser v. Chrysler Corp., 199 F.2d 610 (10th Cir. 1952), *cert. denied,* 344 U.S. 921 (1953). *See also* United States v. Smith, 331 U.S. 469 (1947) (a case, not cited by the Court of Appeals, in which mandamus was used to vacate a new trial order defective on jurisdictional grounds). In the only other case identified by the Court of Appeals, Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971), the court concluded that certain aspects of the new trial order violated Rule 50(b) of the Federal Rules of Civil Procedure and that the court therefore had "exceeded judicial power" (Waterman, J., concurring) in ordering a new trial.

which a new trial order based on a trial court's determination of error in the admission of documentary evidence or lack of a fair trial has been disapproved on mandamus. As the Eighth Circuit concluded in *General Motors Corp.* v. *Lord,* 488 F.2d 1096, 1100 (1978) —a case, like the present, involving a request for mandamus to overturn a new trial order based on the erroneous admission of evidence:

> "This evidentiary question, which was the essential question addressed by the trial court, is no different than any other evidentiary issue trial judges decide in the course of granting motions for a new trial. To grant extraordinary relief here would be to abrogate the final judgment rule, and allow any litigant, who is forced to retrial on an evidentiary question, immediate review simply by styling his action a petition for writ of mandamus instead of appeal. The resolution of this question at this time would have little impact on the administration of justice generally and, since it is clear that the trial court had jurisdiction to act, mandamus is clearly inappropriate." [17]

In sum, certiorari is warranted here because the decision in this case frustrates the important policies embodied in the final judgment rule and is in direct conflict with controlling decisions of this Court and with

---

[17] *Accord, e.g.,* In re United States, 598 F.2d 233 (D.C. Cir. 1979) ("[I]t is not the office of mandamus to correct erroneous interlocutory orders that are within the trial court's jurisdiction * * *.") ; Pat Ryan and Associates, Inc. v. Du Pree, 17 F.R. Serv. 2d 86 (4th Cir. 1973) (opinion not officially reported) ; Thorn v. Parkland Chevrolet Co., 416 F.2d 95 (4th Cir. 1969) (per curiam) ; Bigart v. Goodyear Tire & Rubber Co., 361 F.2d 317 (2d Cir. 1966) (per curiam) ; Atlantic Coast Railroad Co. v. Sonenshine, 226 F.2d 220 (4th Cir. 1955) ; Southern Pacific Co. v. United States District Court, 190 F.2d 735 (9th Cir. 1951).

a virtually unbroken line of cases from other Circuits. There is no basis for distinguishing this case from other cases in which trial courts have applied proper legal standards—centering on the erroneous admission of documentary evidence and the lack of a fair trial—in granting timely motions for a new trial. If mandamus is made available under the "abuse of discretion" standard formulated here by the Court of Appeals, any error—or arguable error—in the granting of a new trial or in the issuance of numerous other interlocutory orders would entitle the disappointed party to immediate appellate review. Review by this Court is urgently needed to prevent this drastic, and unwarranted, expansion of previously settled limitations on the use of mandamus.

3. In fact, the decision in this case illustrates, in most dramatic fashion, the dangers of permitting appellate courts to review new trial orders on mandamus. In ordering reinstatement of the liability verdict, the Court of Appeals proceeded on a palpably incorrect assumption as to the trial court's views on the liability issues presented in this case. The court steadfastly refused to alter this assumption despite undisputed evidence showing that the assumption was incorrect, and despite the fact that the Court of Appeals did not have the benefit of the trial record, an agreed statement of relevant facts in lieu of the trial record, or any briefing on the liability issues.

The Court of Appeals' suggestion that reinstatement of the verdict as to liability is justified because "[n]one of the trial judge's comments were directed to inadequacy of the evidence to establish the conspiracy that is charged" (Pet. App. A, p. 20a) is untenable for a

number of reasons, not the least of which is that it misses the essential point of the district court's comments in setting aside the liability verdict.[18] The district court held that it had erred, because of the failure of respondent to comply with the court's pretrial orders, in admitting a number of documents into evidence—and that, as a result of those errors as well as other factors, petitioners had been deprived of a fair trial. *Id.* at 25a, 28a. The court noted, specifically, that Daiflon had prevailed upon the court to admit many documents under the business records exception to the hearsay rule, even though there had been no testimony or other evidence establishing their status as business records. *Id.* at 28a. Although the court did not refer to these documents by exhibit number, petitioners' memorandum in support of their motion for a new trial identified 95 documents that had been received into evidence without the slightest predicate being laid for their admission.[19] Pet. App. H, p. 112a-113a. The fact that 17 of the 28 exhibits that Daiflon's counsel mentioned during his closing argument to the jury were not identified in any manner during the trial provides some indication of the extent to which the jury's verdict as to liability was premised on inadmissible documentary "evidence." *See id.* at 113a.

In view of the district court's conclusion that a mass of inadequately-qualified documentary material had

---

[18] Rule 52(a) of the Federal Rules of Civil Procedure provides clearly that a new trial motion is not one that requires any supporting findings of fact or conclusions of law. *See, e.g.*, 5A Moore, *Federal Practice* § 52.08 (1979-80 Supp.), and cases cited therein. The Court of Appeals did not even attempt to reconcile this fact with its review of the new trial order entered in this case.

[19] Almost all of these documents were admitted on the issue of liability rather than damages.

been received into evidence, depriving petitioners of a fair trial, there was no reason for the court to dwell at length on the weakness of Daiflon's liability evidence. Nevertheless, the Court of Appeals was in error in suggesting that none of the district court's comments in granting a new trial were directed at the liability issues. *Id.* at 20a. The district court pointed out, for example, that Daiflon's counsel had succeeded in making "a lot out of things that are really not important, as I view it from this evidence * * *." *Id.* at 24a. The court also noted with respect to Daiflon's conspiracy claim, which depended on the jury's finding collusion from similar conduct by petitioners in meeting competitive situations, that petitioners "had a perfect right to meet competition, and for them not to meet competition is to deny them free enterprise. This is what they did in places, but they did it in rare places * * * where they met competition, but generally Daiflon was insignificant * * *." *Id.* at 26a

The district court's comments in connection with petitioners' motion for a directed verdict, made at the close of Daiflon's case-in-chief and renewed just prior to submission of the case to the jury, also confirm the inaccuracy of the factual assumption underlying the Court of Appeals' reinstatement of the liability verdict. The court stated at the close of Daiflon's case-in-chief, for example, that, "up to this point, I think the Court could say that [Daiflon's] case was pretty thin on * * * conspiracy." Trial Tr. of March 20, 1979, p. 25. Following the close of all the evidence, the court again noted the weakness of Daiflon's liability evidence. While informing the parties that the case would be submitted to the jury, the court stated (Excerpt of Proceedings of March 23, 1979, pp. 3-4):

> "The Court, in giving this to the jury, the Court has, as you must know, quite a lot of doubt about it, apprehension about it, which I will not go into now. * * *
>
> "Now, the Court is somewhat in doubt as to whether [it] should submit [the case] to the jury * * *."

If, despite these statements by the trial court, the Court of Appeals has entertained serious doubts about the trial court's position on the liability issues, those doubts should have been removed by the order issued by the district court following the Court of Appeals' denial of the first rehearing petition filed by petitioners. That order, which is reprinted in Appendix E and is quoted at pages 11-12, *supra,* speaks eloquently to the trial court's motivations in granting petitioners a new trial on all issues in the case—and confirms, perhaps most significantly, the trial court's view "that the issue of liability has not been proven * * *."[20] Pet. App. E, p. 36a.

In sum, the Court of Appeals' decision in this case confirms the wisdom of the admonition in *Will* v. *United States, supra,* against appellate courts "suffer[ing] themselves to be misled by labels such as 'abuse of discretion' * * * into interlocutory review of nonappealable orders * * *" (389 U.S. at 98 n. 5). In reinstating the liability verdict in this case, the Court of Appeals (1) relied on a factually inaccurate assumption as to the trial court's views on liability and (2)

---

[20] Significantly, Daiflon has never even attempted to defend the factual assumption underlying the Court of Appeals' reinstatement of the liability verdict—that is, that the trial judge "indicated his belief that [liability] was established" (Pet. App. A, p. 20a).

lacked any independent basis to assess liability—that is, the Court of Appeals did not have before it in this extraordinary proceeding the documentary evidence admitted at trial, a single page of the trial transcript, an agreed upon statement of relevant facts in lieu of the trial record or any briefing on the liability issues in the case.[21] Particularly in view of the trial court's

---

[21] Indeed, while the Court of Appeals proceeded to make factual findings on liability, it admitted that "[t]o the present day we are in the dark as to the identity of the defendants' witnesses and the testimony which was given by them" (Pet. App. A, p. 3a). One of the principal reasons no comprehensive summary of the liability evidence could be prepared is that, to this day, substantial portions of the trial record have not even been transcribed.

An important example of the problems faced by the Court of Appeals in attempting to deal with the liability issues without even a marginally adequate record is provided by the Court of Appeals' suggestion that a conspiracy was established in this case by evidence that petitioners "lowered their prices by 13%, thus foregoing substantial profits." Pet. App. A, p. 20a. Since there is nothing in the comments made by the district court in granting petitioners' motion for a new trial that supports that assertion and, as noted, the Court of Appeals did not have before it any portion of the trial record or an agreed upon statement of the facts, the basis of this assertion must remain a mystery In fact, the evidence at trial showed that none of the petitioners lowered their prices at any time by 13 percent, that the price reduction of which Daiflon complained was made independently by various of the petitioners over a nine-month period, and that the price reduction that occurred was motivated by legitimate business considerations, increasing rather than decreasing petitioners' short- and long-term profits. *See* Pet. App. G, pp. 70a-78a. Indeed, since Daiflon's sales of refrigerant gas never accounted for more than a fraction of one percent of total industry sales, the notion that petitioners (accounting for the bulk of the remaining 99 percent of industry sales) would decrease their prices by 13 percent in order to drive Daiflon out of business borders on the ludicrous. *See id.* at 76a-77a.

The inaccuracy of this pivotal factual assertion by the Court of Appeals demonstrates beyond doubt the unfairness of that court's attempting to assess liability in the context of a mandamus proceeding and reinstating the jury's verdict as to liability.

statement, in withdrawing from any further proceedings in this case, that "liability has not been proven" (Pet. App. E, p. 34a), there is not even a colorable basis for the Court of Appeals' reinstatement of the liability verdict.[22]

4. The Court of Appeals' abuse of the mandamus power in this case is also shown by its refusal to remand the case to the trial court for a fuller statement of its views on liability and for a ruling on the grounds for a new trial that were not dealt with by the trial court.[23] This Court's decision in *Platt* v. *Minnesota*

---

[22] The suggestion that the trial judge should have granted petitioners' motion for judgment n.o.v. if he entertained any doubts as to liability and that, having denied that motion, an appellate court can assume that there was sufficient evidence of liability to invalidate a new trial order (Pet. App. A, 19a), represents a clear error of law. The suggestion is, of course, untenable in view of the different standards that apply to motions for judgment n.o.v. and for a new trial. *See, e.g.*, 11 Wright & Miller, *Federal Practice and Procedure* § 2806 (1973), and cases cited therein.

Similarly, the Court of Appeals' suggestion that the question of damages involves issues of fact, while liability involves simply "a question of or questions of law" (Pet. App. A, p. 21a), is mistaken. If that suggestion were taken at face value, there would be no reason for a jury determination on liability. In the present case, petitioners strongly disputed each of Daiflon's factual allegations with respect to liability. *See* Pet. App. G, pp. 45a-84a; Pet. App. H, p. 108a.

[23] Included in the arguments advanced in petitioners' motion for a new trial were that Daiflon's evidence both as to conspiracy and monopolization was deficient in a number of critical respects (Pet. App. H, p. 108a) and that the district court had erred in refusing to strike the testimony of one of Daiflon's liability witnesses who admitted on cross-examination that the conclusions he had proffered during his direct testimony were "inaccurate and misleading." *Id.* at 108a-110a.

Mining & Mfg. Co., 376 U.S. 240 (1964), is dispositive in this regard.

Platt was a mandamus proceeding in which the Court of Appeals determined that the trial court had relied on an improper factor in denying a criminal defendant's transfer motion. The Court of Appeals then issued a writ ordering the transfer. This Court reversed. It held that the trial court's use of an inappropriate factor did not empower the Court of Appeals to order the transfer. It said that the function of the Court of Appeals was to determine the appropriate criteria and then leave their application to the trial judge on remand. Noting that extraordinary writs are reserved for truly extraordinary causes and then only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so, this Court said:

> "Here, however, the Court of Appeals undertook a *de novo* examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the court should not have done since the writ cannot be used 'to actually control the decision of the trial court' [citation omitted]." 376 U.S. at 245.

This is precisely the usurpation of judicial power exercised by the Court of Appeals here. In purporting to make its own findings on the liability issues in the case and issuing a writ of mandamus on this basis, it improperly "control[led] the decision of the trial court" and precluded it from exercising its discretion on numerous important issues presented by petitioners' new trial motion.

CONCLUSION

In reviewing, by way of mandamus, an order granting a new trial, the Court of Appeals' decision in this case is plainly inconsistent with recent decisions of this Court and other courts of appeals. If permitted to stand, the decision in this case will be seen by litigants as an open-ended invitation to obtain immediate appellate review of interlocutory orders by casting their papers in the form of a mandamus petition rather than an appeal. In fact, the decision in this case provides overwhelming evidence of the importance to sound judicial procedure of previously settled limitations on mandamus—and of the dangers of permitting, in the context of an extraordinary proceeding, immediate appellate review of new trial orders.

Petitioners respectfully suggest that this Court should not only issue a writ of certiorari but should also enter an order of summary reversal. The decision of the Court of Appeals is palpably erroneous and, so long as it stands, will cause confusion in the lower federal courts. There will in any event be a new trial in this case before a new judge. Summary reversal would merely assure that liability as well as damages would be re-tried—in accordance with the judgment of the trial judge who heard "the evidence in its entirety and hence is in a much better position" than an appellate court acting without a trial record to determine the propriety of a new trial. There already would have been such a retrial, in accordance with the trial court's order that was entered more than a year ago, were it not for the Court of Appeals' erroneous intervention in the matter.

Summary reversal by this Court will eliminate, without further delay, the decision of the Court of Appeals as a precedent and significantly facilitate an expeditious final resolution of this litigation.

Respectfully submitted,

JOHN S. ATHENS
DOUGLAS L. INHOFE
CONNER, WINTERS, BALLAINE,
BARRY & MCGOWEN
2400 First National Tower
Tulsa, Oklahoma 74104
Attorneys for Petitioner
Allied Chemical Corporation

COLEMAN HAYES
MONNET, HAYES, BULLIS,
THOMPSON & EDWARDS
1719 First National Center West
Oklahoma City, Oklahoma 73102

HERBERT DYM
JOHN P. RUPP
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner
E. I. du Pont de Nemours and Company

JAMES M. STURDIVANT
SIDNEY G. DUNAGAN
GABLE, GOTWALS, RUBIN, FOX,
JOHNSON & BAKER
2010 Fourth National Bank Building
Tulsa, Oklahoma 74119
Attorneys for Petitioners
Kaiser Aluminum & Chemical Sales,
Inc., and Kaiser Aluminum &
Chemical Corporation

PETER B. BRADFORD
McAFEE & TAFT
Fifth Floor
100 Park Avenue
Oklahoma City, Oklahoma 73102

HENRY KOLOWRAT
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania 19102
Attorneys for Petitioner
Pennwalt Corporation

J. L. WEIGAND, JR.
CURFMAN, HARRIS & WEIGAND
830 First National Bank Building
Wichita, Kansas 67202
Attorney for Petitioner
Racon Incorporated

D. KENT MEYERS
CROWE, DUNLEVY, THWEATT,
SWINFORD, JOHNSON & BURDICK
1700 Liberty Tower
100 Broadway
Oklahoma City, Oklahoma 73102
Attorney for Petitioner
Union Carbide Corporation

May 1980

79-1895

APPENDIX

Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ALLIED CHEMICAL CORPORATION, ET AL.,
Petitioners,

v.

DAIFLON, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ALLIED CHEMICAL CORPORATION, ET AL.,
Petitioners,

v.

DAIFLON, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

INDEX TO APPENDIX

Page

A. Opinion of the United States Court of Appeals for the Tenth Circuit, dated December 21, 1979 ..... 1a

District Court's Comments and Rulings on Defendants' Motions for Judgment N.O.V. and for New Trial, dated May 14, 1979 ..... 23a

B. Judgment and Writ of Mandamus 29a

C. Court of Appeals Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, dated March 5, 1980 ..... 31a

D. Court of Appeals Order Requiring Submission of "Narrative Statements," dated August 10, 1979 ... 32a

E. District Court Order Announcing Recusal, dated April 7, 1980 ..... 34a

F. Statutory Provisions Involved 38a

G. Memorandum in Support of Motion for Judgment Notwithstanding the Verdict 39a

H. Memorandum in Support of Motion for New Trial 95a

APPENDIX A

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 79-1459

DAIFLON, INC., *Petitioner,*

v.

The HONORABLE LUTHER BOHANON, Judge of the United States District Court for the Western District of Oklahoma, *Respondent.*

Argued and Submitted October 9, 1979

Decided December 21, 1979

Before McWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

These are proceedings in which Daiflon seeks review of an order of the district court granting a new trial in an antitrust case which had been tried to a jury. Daiflon prevailed in that case and recovered a judgment in the amount of $2.5 million actual damages. Daiflon moved the court to treble this amount. The court simply ordered entry of judgment for $2.5 million. The trial court granted a new trial on all of the issues. *See* Exhibit A. Daiflon seeks to prohibit further proceedings except as the same are necessary in order to enter judgment on the verdict including treble damages, and to determine and assess the costs against the defendants, including attorneys' fees.

The remedy here sought is pursuant to extraordinary writ, 28 U.S.C. § 1651(a) and Fed.R.App.P. 21. Daiflon contends that the trial court's new trial order exemplified an erroneous practice likely to recur. It calls attention to the fact that the trial judge, the Honorable Luther Bohanon, had previously dismissed this case for a trivial

reason which necessitated a reversal by this court. In that instance the judge entered an order of dismissal with prejudice for failure of Daiflon to answer one discovery question. This order was vacated and the cause was reinstated by this court. *See Daiflon v. Allied Chemical Corp.*, 534 F.2d 221 (10th Cir.), *cert. denied* 429 U.S. 886, 97 S.Ct. 239, 50 L.Ed.2d 168 (1976). In essence, the petitioner contends that the trial judge has a misconception of the scope and extent of trial court's authority to grant a new trial. Daiflon's position appears to be that the judge acted on the premise that the trial court's discretion is virtually unlimited, and that because of this there exists a likelihood that there will be a repetition of the present result.

To obtain relief Daiflon must, of course, demonstrate that its right is clear and indisputable. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978); *State Farm Mutual Automobile Ins. Co. v. Scholes*, 601 F.2d 1151, 1154 (10th Cir. 1979). Daiflon is required to show that the order was not only erroneous under normal standards of appellate review, but also that the ruling is so extraordinary as to evidence arbitrariness and a clear abuse of discretion.

The record here is a special one which was prepared by counsel on order of this court once it had been decided that the case should be reviewed at least to some extent. There was no transcript filed so the parties were ordered to prepare simultaneous summaries of the evidence which had been presented by each side at the trial. This was to have been in lieu of a transcript.[1] Petitioner followed the direc-

---

[1] The pertinent part of our order noted that the court lacked a transcript of the evidence. In view of that, the parties were directed as follows:

> Accordingly, the parties are directed, in lieu of a transcript of the evidence, to prepare and sign a narrative statement of the case along the lines provided in Rule 10(d) of the Rules of Appellate Procedure. Each side shall prepare a summary of the evidence presented by it at the trial. These summaries

tions of the court fully. It presented a 160-page document which was fully referenced, and which complied in every detail with the court's order. It was not required to summarize the defendants' testimony at the trial and so it did not do so, with the possible exception of presenting evidence in some instances that had been brought out by Daiflon on cross-examination of defendants' witnesses. The petitioner had a right to assume that the defendants would present in summarized form the testimony of their own witnesses. The defendants' statement was relatively brief and had an argumentative tone and sought to answer petitioner's reply brief. Essentially, it was a brief and argument. Only the testimony of one witness was summarized, and that was not fully presented.[2]

The facts can be stated briefly. From 1969 to 1972, Daiflon had engaged in the business of importing refrigerant gas from Japan. The gas was repackaged by Daiflon and resold to both wholesaler and retail contractors and servicemen in the non-automotive air conditioning industry. This suit was commenced on July 12, 1972, seven years prior to the instant proceedings. The suit was brought under the Sherman Act, §§ 1 and 2, in the United States District Court for the Western District of Oklahoma. The defendants named were E. I. du Pont de Nemours & Co., Allied Chemical Corp., Kaiser Aluminum & Chemical Corp., Pennwalt Corp., Racon, Inc., and Union Carbide Corp., all of which manufactured refrigerant gas. In the suit it was alleged that the defendants had engaged in an unlawful

---

shall be simultaneously prepared and shall be simultaneously submitted on or before September 11, 1979.

It was thus plain that an argumentative brief was not being sought.

[2] It did not present a summary of the evidence presented by defendants as called for. To the present day we are in the dark as to the identity of the defendants' witnesses and the testimony which was given by them.

price-fixing conspiracy, the object of which was to exclude Daiflon from the market. A further allegation was that defendants conspired to monopolize the market and that du Pont had engaged in monopolization through predatory pricing and disparagement of Daiflon's products. There was testimony presented at the trial that each of the defendants reduced their selling prices for refrigerant gas in March 1971 by 13%, and that the defendants had further reduced the selling prices of two grades of refrigerant gas in March 1972. Daiflon ceased doing business in October 1972. After the cessation of its business, defendants increased their prices to the pre-March 1971 level.

There was testimony that du Pont had approximately 45% of the market; Allied Chemical had approximately 18-20%; Union Carbide, 12-14%; Pennwalt, 8-9%; Kaiser, 7-8%; and Racon, 2%. Daiflon sold its refrigerant gas in 31 states, although its share of the market was estimated to be .5% prior to the price lowering of the defendants. There does not appear to be any quality difference in this product.

Daiflon's sales were shown to have increased after it was formed in 1969 until June 1971, at which time the price decrease of the defendants was felt and the sales of Daiflon reduced from $160,000 to $10,000 in one month. Following this, Daiflon was ordered by its bank to liquidate.

In August 1971, the President imposed a ten percent surcharge on all imported goods and thereby increased the duty on refrigerant gas from six to sixteen percent. This continued in effect until December 1971, at which time the dollar was devalued against the yen. Daiflon did not import refrigerant gas from Japan after August 1971, but sold it out of its inventory. The defendants maintained that Daiflon's failure was due to the imposition of the import surcharge and to problems in Daiflon's operations, and was not due to the defendants' actions. This was un-

doubtedly one of the primary fact issues submitted to the jury.

After trial, the trial court denied the defendants' motion for judgment notwithstanding the verdict. The judge did not formally vacate the judgment entered in favor of Daiflon on April 9 in conjunction with the grant of the new trial. No doubt this was oversight. The defendants have nevertheless filed a notice of appeal from the judgment and also from the denial of their motion for judgment notwithstanding the verdict.

It would appear from reading the transcribed oral ruling of the judge that the trial court's dissatisfaction was on the basis that the *damages* were excessive and was on the further ground that he had erred in the admission of unidentified exhibits.

The trial court's main disagreement was with the amount of the verdict. The judge stated in connection with the new trial order that the amount of the award shocked him, and the indications were that he would have been even more shocked had he ordered the trebling of the damages. The judge had much less to say about the jury's conclusion that the defendants were liable under the antitrust laws. The main complaint here was that there was not enough time and effort given to determining the authenticity of the documents that were received in evidence, and he expressed a determination to consider them with much greater care on retrial. At the same time he did not point out any single document or group of documents which should not have been received.

Discussion of the Issues

The primary question in the case is whether, in view of the fact that final judgment or final order is not from a practical standpoint present in the record, and hence there is not an adequate remedy at law, an extraordinary writ

can be employed to review the validity of the order of the trial court granting a new trial.

In our opinion the trial court merely overlooked formal vacating of the judgment, and therefore we must assume that this intended object was carried out since the new trial was ordered.

The defendants take the position that there is *no* remedy under an extraordinary writ. The only possibilities, according to them, are, first, to grant their motion for judgment notwithstanding the verdict, or, second, to retry the case. Defendants do not give recognition to possible use of the writ on the basis of "a clear abuse of discretion, an abdication of the judicial function, or the usurpation of judicial power." *Paramount Film Distributing Corp. v. Civic Center Theater, Inc.*, 333 F.2d 358, 361 (10th Cir. 1964), *citing La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957). The truth is that the extraordinary remedy route is limited, but it cannot be said to be nonexistent.

We take note of the fact that there has been no certification pursuant to 28 U.S.C. § 1292(b). This interlocutory appeal procedure was not a viable possibility. Defendants suggest that Daiflon should have sought to oust the judge by means of §§ 144 and 455 of the Judicial Code on the basis of an affidavit that he was biased and prejudiced. This procedure has not been pursued by the petitioner as of the present time at least, and there is nothing in the record which indicates that such a course had been contemplated.

It goes without saying that an orthodox appeal pursuant to § 1291 of the Judicial Code is not a possibility because, as indicated above, there is no final judgment or final order which could support an appeal. The grant of a new trial is not a final judgment.[3]

---

[3] *See Kanatser v. Chrysler Corp.*, 199 F.2d 610, 615 (10th Cir. 1952), *cert. denied* 344 U.S. 921, 73 S.Ct. 388, 97 L.Ed. 710 (1953).

A valid basis for obtaining appellate review is somewhat elusive. Thus, this is not a question of the trial court's acting beyond its *jurisdiction.* This is a recognized exception to the final judgment rule.[4] What we are confronted with is a request for extraordinary review questioning whether there has been a clear abuse of discretion in granting the new trial. So, the lack of jurisdiction remedy is out.

There is a concept of finality which had a practical and nontechnical construction.[5] It is, however, no longer a viable theory. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). The concept of piecemeal review has rendered the death knell threat practically ineffectual.

General Issuance of a Writ of Mandamus as an Instrument of Appellate Review

The only remaining alternative is therefore whether there is some inherent basis to be found within the four corners of the writ of mandamus. We proceed to that inquiry.

The relevant statute, 28 U.S.C. § 1651(a), is not itself narrow and restrictive. It provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

---

[4] *Demeretz v. Daniels Motor Freight, Inc.*, 307 F.2d 469 (3d Cir. 1962).

[5] *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 171, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).

So, then, it is a question whether the circumstances here are agreeable to the usages and principles of law.

Perhaps the area which offers a possibility for review is supervisory use of the writ of mandamus in accordance with *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), and *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). *See generally* 16 C. Wright, A. Miller, E. Cooper, E. Gressman, Federal Practice & Procedure § 3934 (1977); Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 *Harv.L.Rev.* 595 (1973). The supervisory aspect of mandamus has indeed been used in order to review the granting of a new trial.[6] However, the decisions reveal great reluctance to employ it even for the purpose of supervision.[7]

Little encouragement for use of writs is to be derived from the Supreme Court decisions even for supervisory purposes, although the Supreme Court has approved its use to review interlocutory orders where the judge being supervised has "displayed a persistent disregard of the [Federal] Rules of Civil Procedure" so as to justify exercising supervisory authority to control his conduct,[8] or to confine the trial court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). *Roche* emphasized that mandamus is to be used to aid appellate jurisdiction by removal of obstacles to an appeal but not as a substitute for the appeal procedure pre-

---

[6] *Grace Lines, Inc. v. Motley*, 439 F.2d 1028 (2d Cir. 1971).

[7] *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978).

[8] *Will v. United States*, 389 U.S. 90, 96, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); *La Buy v. Howes Leather Co., supra. See also United States v. Smith*, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947).

scribed in § 1291. Of course there must be no adequate means at law for gaining review.[9] The petitioner has the burden of showing that his right to the writ is "clear and indisputable." [10]

Hardship and inconvenience standing alone are, of course, insufficient under the *Roche* doctrine. This is not to say that cost and inconvenience to the petitioner involved in retrying the case, repreparing it and rediscovering evidence are not entitled to any consideration, but these burdens must be in conjunction with misuse of process or authority in order to outweigh the roadblock based upon the policy of avoiding piecemeal review.[11] In *Bankers Life & Casualty Co. v. Holland,* 349 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 106 (1953), it was emphasized that the review that is possible pursuant to extraordinary writs is to be used only in exceptional cases involving a clear abuse of discretion or usurpation of judicial power. The Supreme Court there refused to review by extraordinary writ.

In *La Buy v. Howes Leather Co.,* 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), the holding condemned the surrender by the district court of the power to try the case before it. The use of an unsupervised master to carry out the entire trial was condemned. The abdication by the judge of his official function was held to be a clear abuse of discretion. The recognition given to the scope of the writ in *La Buy* and in the Supreme Court's decision in *Schlagenhauf v. Holder,* 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (mandamus used to enforce Rule 35(a) of the Rules

---

[9] *Kerr v. United States District Court,* 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976).

[10] *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 662, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978); *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 384, 74 S.Ct. 145, 98 L.Ed. 106 (1953).

[11] *United States Alkali Export Ass'n v. United States,* 325 U.S. 196, 202, 65 S.Ct. 1120, 89 L.Ed. 1554 (1945).

of Civil Procedure), do serve as guides to supervisory use of the writ.[12] *Will v. United States,* 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), contained some slight enthusiasm for use of the writ. It said that such writs may serve "a vital corrective and didactic function" in the federal judicial system. 389 U.S. at 107, 88 S.Ct. at 280.

Generally, the more recent cases tend to tighten the restrictions. *See Kerr v. United States District Court,* 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976), and *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed. 2d 504 (1978). The *Will* case was a plurality decision in which the main opinion was by Mr. Justice Rehnquist. It reversed a Seventh Circuit decision granting a writ of mandamus to overturn a district court's stay of federal court proceedings pending the completion of state court litigation. It was held that the determination as to whether to defer to state court proceedings rested in the discretion of the district court, and in such circumstances a litigant's right to the writ was not considered to be clear and indisputable. Plain abuse of discretion or abuse of power which add up to mere erroneousness was said not to furnish a basis for interlocutory review by writ. Justice Blackmun specially concurred in the Rehnquist opinion. The Burger, Brennan, Marshall and Powell dissent maintained that the clear abuse of discretion standard set forth in *La Buy* was still a valid basis for issuance of a writ of mandamus.

Granted that erroneousness does not constitute a valid ground for issuance of the writ. Nevertheless, it cannot be said that the clear abuse of discretion standard is repudiated. So, therefore, if it is found that there is a disregard for proper procedure, or misuse of judicial power in the

---

[12] *See generally* 16 C. Wright, A. Miller, E. Cooper, E. Gressman, Federal Practice & Procedure §§ 3934-35 (1977); Note, *Supervisory and Advisory Mandamus under the All Writs Act,* 86 *Harv.L.Rev.* 595 (1973).

trial judge's conduct, this would constitute a clear abuse of discretion.

If it is found that there was plain or clear error in the judge's evaluation of the facts and that the granting of a new trial was gross or excessive to the extent that it is extraordinary, it would seem that vacating the order granting the new trial would be permissible.

The Tenth Circuit Cases on Use of the Writ for Review

In the Tenth Circuit the extraordinary writs have been used where there has been a clear abuse of discretion or where the right to relief is clear and indisputable.[13]

In *Erie v. United States District Court,* 362 F.2d 539 (10th Cir. 1963), *overruled on other grounds, Liberty National Bank & Trust Co. v. Acme Tool Div., Rucker Co.,* 540 F.2d 1375 (10th Cir. 1976), the element of hardship to the petitioner was present. Relief was not granted on that basis. *Usery v. Ritter,* 547 F.2d 528, 532 (10th Cir. 1977), approved use of mandamus for the purpose of reviewing a district court's discovery order which had compelled the Secretary of Labor to reveal the identity of informants in an action involving violation of the equal pay provisions of the Fair Labor Standards Act. In *Bruce v. Bohanon,* 436 F.2d 733 (10th Cir. 1970), *cert. denied sub nom. Marathon Oil Co. v. Bruce,* 403 U.S. 918, 91 S.Ct. 2227, 29 L.Ed.2d 694 (1971), a writ of mandamus was issued for the purpose of reviewing a pretrial order of the district judge which had provided that certain of the claims be tried to a jury and others to the court. Plaintiff

---

[13] *State Farm Mutual Automobile Ins. Co. v. Scholes,* 601 F.2d 1151, 1154 (10th Cir. 1979); *Usery v. Ritter,* 547 F.2d 528, 532 (10th Cir. 1977); *Prop-Jets, Inc. v. Chandler,* 575 F.2d 1322, 1324 (10th Cir. 1978); *Paramount Film Distributing Corp. v. Civic Center Theater, Inc.,* 333 F.2d 358, 361 (10th Cir. 1964); *Pet Milk Co. v. Ritter,* 323 F.2d 586, 588 (10th Cir. 1963).

had filed a timely demand for jury trial on all issues. This, of course, was a classic use of the mandamus in a supervisory way.

There are other instances in which our court refused to review interlocutory orders in the absence of a showing of clear abuse of discretion or abdication of judicial function. *See State Farm Mutual Automobile Ins. Co. v. Scholes*, 601 F.2d 1151 (10th Cir. 1979); *Prop-Jets, Inc. v. Chandler, supra; Paramount Film Distributing Corp. v. Civic Center Theater, Inc., supra; Pet Milk Co. v. Ritter, supra.*[14]

On only two occasions have we considered issuance of the writ in order to review the trial court's granting of a new trial. One of these was *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952). The order in that case was entered on grounds other than those contained in the motion for new trial. Also, the order granting new trial was out of time (six months). Thus, there was a question of jurisdiction as well as a question of failure to observe the

---

[14] The other circumstances in which this court has ruled on the propriety of granting or denying extraordinary relief involved the more traditional function of the writ "to confine an inferior court to lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority . . .." *Roche v. Evaporated Milk Ass'n, supra*, 319 U.S. at 26, 63 S.Ct. at 941. *E.g., Estate of Whitlock v. Commissioner*, 547 F.2d 506 (10th Cir. 1976), *cert. denied* 430 U.S. 916, 97 S.Ct. 1329, 51 L.Ed.2d 594 (1977) (mandamus issued to order Tax Court to comply with previously issued Tenth Circuit mandate); *Breckenridge Lands, Inc. v. Sabo*, 376 F.2d 840 (10th Cir. 1967) (denied writ to review new trial order entered within district court's jurisdiction); *Erie v. United States District Court*, 362 F.2d 539 (10th Cir. 1963), *overruled on other grounds, Liberty National Bank & Trust Co. v. Acme Tool Div., Rucker Co.*, 540 F.2d 1375 (10th Cir. 1976) (mandamus issued to compel district court to dismiss counterclaim filed in interpleader action); *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied* 344 U.S. 921, 73 S.Ct. 388, 97 L.Ed. 710 (1953) (granted writ to review new trial order made on grounds outside trial court's jurisdiction); *Tuggle v. Chandler*, 199 F.2d 86 (10th Cir. 1952) (extraordinary relief denied as premature).

procedural rules. Also, the trial court stated that it was not going to permit a verdict which exceeded $15,000 to stand. Thus, the circumstances of the Kanatser case displayed an arbitrariness that strongly recommended the supervisory writ. *Breckenridge Lands, Inc. v. Sabo,* 376 F.2d 840 (10th Cir. 1967), is one in which this court denied relief in the new trial situation. In that case there was a lack of any showing of judicial misconduct or clear abuse of authority.

Consideration of the Cases From Other Circuits in Which Review of Orders Granting a New Trial Was Sought by Use of an Extraordinary Writ

From an examination of the decisions of the various circuits in which extraordinary relief was sought to review orders granting new trial, it would appear that in the majority of the cases writs were denied.[15]

In each of the cases that are cited below the court sought to find extraordinary circumstances capable of justifying issuance of the writ. In the absence of extraordinary circumstances it was held that the general principle controlled that extraordinary writs cannot be used as substitutes for the appellate process.[16]

In *General Motors Corp. v. Lord,* 488 F.2d 1096 (8th Cir. 1973), the Eighth Circuit enumerated some circum-

---

[15] *General Motors Corp. v. Lord,* 488 F.2d 1096 (8th Cir. 1973); *Pat Ryan & Assoc., Inc. v. Dupree,* 17 F.R.Serv.2d 192 (4th Cir. 1973) (unpublished opinion); *Thorn v. Parkland Chevrolet Co.,* 416 F.2d 95 (4th Cir. 1969); *Breckenridge Lands, Inc. v. Sabo,* 376 F.2d 840 (10th Cir. 1967); *Benton Harbor Malleable Industries v. International Union, United Automobile, Aircraft and Agricultural Implement Workers,* 355 F.2d 70 (6th Cir. 1966); *Bigart v. Goodyear Tire & Rubber Co.,* 361 F.2d 317 (2d Cir. 1966).

[16] *General Motors Corp. v. Lord, supra,* 488 F.2d at 1099; *Benton Harbor Malleable Industries v. International Union, etc., supra,* 355 F.2d at 72-73.

stances where review by mandamus is proper. They are as follows:

First, extraordinary circumstances may be present when the district court's order was entered without the court having jurisdiction. *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943).

Second, extraordinary circumstances may be present where the order under attack is characteristic of an erroneous practice which is likely to recur. *See, e. g., La Buy v. Howes Leather Co.,* 352 U.S. 249, 258, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957); Note, *Supervisory and Advisory Mandamus under the All Writs Act,* 86 *Harv.L.Rev.* 595, 610 (1973).

Third, where the order under attack presents a novel and important question in which there is a need for guidelines which would, if set forth, be useful for the resolution of similar cases. *See Schlagenhauf v. Holder,* 379 U.S. 104, 111-12, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); Note, *Supervisory and Advisory Mandamus under the All Writs Act, supra,* 86 *Harv.L.Rev.* at 618-19.

The Eighth Circuit recognized the obvious general rule which is that the grant of a new trial is insufficient without more to justify the use of the writ. We are, of course, constantly aware of that. The second standard set forth above, namely that of the presence of extraordinary circumstances where the order under attack is characteristic of an erroneous practice likely to recur, is the basis on which the petitioner seeks relief in the present case.

There are very few cases in which an extraordinary writ has been approved for the purpose of reviewing orders granting a new trial (only three to be exact). These are *Peterman v. Chicago, Rock Island & Pacific Railroad Co.,* 493 F.2d 88 (8th Cir. 1974), *cert. denied* 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1974); *Grace Lines, Inc. v. Motley,* 439 F.2d 1028 (2d Cir. 1971); and *Kanatser v.*

Chrysler Corp., 199 F.2d 610 (10th Cir. 1952), *cert. denied* 344 U.S. 921, 73 S.Ct. 388, 97 L.Ed. 710 (1953).

In *Peterman*, the court ordered a new trial sua sponte and did so outside of the ten-day time limitation provided in Federal Rules of Civil Procedure 59(d).

In *Kanatser*, this court ordered a new trial on grounds which were not stated in the motion six months after entry of judgment.

The third case, *Grace Lines, Inc. v. Motley, supra*, exemplifies the second extraordinary circumstance set forth in *Lord*, namely the use of supervisory mandamus. In *Grace Lines* the trial court had ordered a new trial three days after declaring a mistrial. Thus, there was misuse of the Rules of Civil Procedure which precluded the use by the defendants of Fed.R.Civ.P. 50(b) for judgment notwithstanding the verdict, which constituted a violation by the trial court of Rule 50(b). The Second Circuit determined that it was an appropriate case for review. The writ of mandamus was used to reinstate the jury verdict.

United States v. Smith, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947), was relied on by the Second Circuit in *Grace Lines, Inc.* In the *Smith* case the Supreme Court held that mandamus was proper to vacate an order for new trial which was made in violation of the Federal Rules of *Criminal* Procedure.

The opinion of the Second Circuit in *Grace Lines* contains a summary of the scope of the appellate court supervisory authority under the All Writs Act. The conclusion reached was that ordinarily the order granting a new trial must await the entry of a final judgment following a new trial.[17] The Second Circuit went on to say that the purpose of the All Writs Act, 28 U.S.C. § 1651, is to allow the

---

[17] Unless, of course, the trial judge is dissatisfied with the verdict and orders another new trial.

appellate courts to review by mandamus non-appealable interlocutory orders which would be the subject of appeal from a final judgment.

The *Grace Lines* court explained that supervisory mandamus is not to be used to authorize indiscriminate use of prerogative writs as a medium for reviewing interlocutory orders. The court concluded that "Mandamus will lie, in the sound discretion of the appellate court, where the trial court has exceeded or wrongfully refused to exercise its judicial power or has committed a clear abuse of discretion * * * * [I]n such cases the desirability of present review outweighs the policies which confine appeals to the review of final orders." 439 F.2d at 1031 n. 2.

It is important to notice that the cases in which relief has been granted involved errors of law rather than fact. For example, where the order for new trial was granted on the basis that damages were excessive, mandamus has been denied. *Pat Ryan & Assoc., Inc. v. Dupree,* 17 F.R. Serv.2d 192 (4th Cir. 1973). *See also Benton Harbor Malleable Industries v. International Union, etc.,* 355 F.2d 70 (6th Cir. 1966).

In summary, in order to grant relief an appellate court must find not only that the trial judge's grant of a new trial was erroneous, but also that the judge's conduct of the litigation was such as to raise a conclusion that the judge clearly abused his discretion and that appeal is not an adequate remedy under the circumstances.

Is the Posture of This Case Such That a Writ Should Issue?

Stated differently, does the record establish that the grant of the new trial was not only erroneous but indeed served to demonstrate such a clear abuse of trial court discretion that statutory appeal would not be an adequate remedy under the circumstances.

In our view the question whether the writ should issue and the question of entitlement to relief are intermingled. Thus, if the proof is sufficient to justify the issuance of the writ, the question whether there is entitlement to relief will have been determined.

The questions are hard and the answers are also difficult. The retrial will be even more difficult inasmuch as a new round of discovery is contemplated by the trial court. There is reason to believe that the trial judge was somewhat dissatisfied with the presentation which was made by the defendants and that he felt that this should be changed in the event of a second trial.

The judge is, of course, not in a position of advocacy and if he does hold the view (and this has to be read between the lines) that the court should encourage the development of the defendants' case, he would be acting outside of and beyond the authority. The fact that one side was not prepared to the extent that the court felt it ought to have been is not a basis for the grant of a new trial.

The trial court's rulings and comments on defendants' motion for judgment notwithstanding the verdict and new trial are appended hereto, and these comments are cogent evidence to be considered in making the present determination. These comments of the trial judge were made on May 14, 1979, following the arguments on motion for new trial. At that time the court emphasized that it had only one object and that was to see that the parties had a fair trial. The judge proceeded to conclude that a judgment notwithstanding the verdict in accordance with the motion of the defendants could not under any circumstances be granted. The court added: "It would not fit this case at all." At the same time the judge concluded that the jury verdict had to be vacated and that a new trial had to be granted. The reasons given were, first, that counsel for the plaintiff was an exceedingly good lawyer and able to

make a lot out of things that really had no importance. The court said that Mr. Crawford had the jury in the palm of his hand almost from the beginning and that the defendants were put at a great disadvantage because they did not know what the plaintiff's evidence was going to be. The court said that the defendants had opened their files completely and yet were kept in the dark as to the parts of the files that the plaintiff would select and use. The court expressed dissatisfaction with the method for passing on the authenticity of the exhibits.

The judge continued that although he had complete appreciation for the work of the jury, the jury needed to be, and apparently was not, apprised of the magnitude of the problems inasmuch as the issues were foreign to them (and perhaps beyond their comprehension). From this it was concluded that there was not a fair trial. His main reason is stated as his next point in the informal findings, that the verdict of $2.5 million indeed was excessive inasmuch as the original capital investment was only $200,000. It should be said at this time that the trial court was not correct in this statement because the actual initial capital was $300,000 together with a very substantial line of credit amounting to approximately $500,000. The court said that the defendants had a perfect right to meet competition. At the same time the judge said that Daiflon was insignificant.

The judge went back to the damages and said: "What are the actual damages? There is nowhere it reaches two and a half million dollars." The judge was also depressed about having to treble the amount of the damages. On this he said: "Well, here is what the court is going to do. The Court grants a new trial; and we are going to have a conference where every exhibit to be used by either side will be passed on before we ever call a jury." Actually this procedure was followed in the proceedings before us, but undoubtedly from what the judge said it was not pursued

to the full satisfaction of the trial court. In any event, he was looking forward to a conference for the purpose of reconsidering the admissibility of all exhibits and for the purpose of examining the depositions that are to be read to the jury. On this it should be added that this information was fully communicated to the defendants and was available to the court. It is not up to the litigants to guarantee that everybody who is interested will read this material before trial.

The trial court also mentioned that some of the exhibits which were admitted had been erroneously received. It is important to mention, however, that the judge does not specify as to which of these were improperly received and there is no way to ascertain this. He spoke of proofs of papers "in the usual course of business, a lot of them were never identified by the custodian. A lot of them were not proved. They were just thrown in evidence." The court concluded, "Well, the court is absolutely not satisfied with it. The verdict of the jury, the Court was shocked when the verdict was read of $2,500,000 based upon the evidence before that jury, just does not justify that kind of a verdict."

It is thus apparent that it is the amount of the verdict rather than any other factor which caused the judge to enter the order for new trial. From an examination of the trial court's comments it is to be concluded that there is no rational basis furnished for granting a new trial other than the magnitude of the verdict.

As far as liability is concerned, the judge indicated his belief that it was established. If he had doubts about this, he would have granted the defendants' motion for judgment notwithstanding the verdict. This was a subject on which he was positive. He said that this would not be appropriate under any thinking or analysis. On the subject of liability, this is not a case in which the evidence

to establish liability is vague and questionable. The evidence supported the conclusion that the several defendants engaged in a "buccaneering" scheme designed to eliminate the plaintiff as a contender. To be sure, Daiflon's market share was relatively small, but the price manipulation and the timing lends itself to the interpretation that elimination of Daiflon was an object of the conspiracy. Defendants lowered their prices by 13%, thus foregoing susbtantial profits.

None of the trial judge's comments were directed to inadequacy of the evidence to establish the conspiracy that is charged. Instead the burden of the trial court's discussion was on the magnitude of the judgment and the deficiency of evidence to support it. From the record before the court, which admittedly is not a full record, it is not clear that the evidence was insufficient to satisfy the $2.5 million verdict. However, the cases teach us that subject only to the limitation of the Seventh Amendment the trial court's discretion is most full and complete when the court is considering a factual question such as damages. *Richardson v. Communications Workers of America,* 530 F.2d 126, 129 (8th Cir.), *cert. denied* 429 U.S. 824, 97 S.Ct. 77, 50 L.Ed.2d 86 (1976); *Brown v. Richard H. Wacholz, Inc.,* 467 F.2d 18 (10th Cir. 1972).

This court is, in view of this, unwilling to vacate the trial court's determination based on possible erroneous premises which the court entertained on the damages issue, because the trial court did hear the evidence in its entirety and hence it is in a much better position to judge this issue than is an appellate court.

We take a different view, however, of the issue of the liability of the defendants, and we point out that as to this element the trial court has given no reason to indicate that the record evidence was insufficient or that the jury acted erroneously in making its determination as to lia-

bility. The trial judge offered no rational basis for invalidating the jury verdict in its entirety. He pointed out no particular error in law or in the receipt of evidence. He appeared to have ordered a new trial primarily because he was shocked at the size of the verdict. By so doing, the trial court invaded the province of the jury as the primary trier of fact, *cf. Moore v. Shultz,* 491 F.2d 294 (10th Cir.), *cert. denied* 419 U.S. 930, 95 S.Ct. 203, 42 L.Ed.2d 161 (1974), and interfered with Daiflon's right to a jury trial under the Seventh Amendment.

> [I]t has long been the rule that a trial judge should not act merely as a "13th juror" and set a verdict aside simply because he would have reached a different result had he been the trier of fact. Rather, the judge's duty is to exercise a more limited judicial discretion. . . . A trial judge is not to interfere with the verdict, "unless it is quite clear that the jury has reached a seriously erroneous result."

Borras v. Sea-Land Service, Inc., 586 F.2d 881, 887 (1st Cir. 1978).

In summary and conclusion:

Despite the narrowness of the exception which allows appellate review on extraordinary writ of orders granting new trial, we are convinced that a case has been made here for review by supervisory mandamus on the issue of liability of the defendants to the plaintiff-petitioner. As we have stated above, we take a different view of the issue of damages, even though the trial judge went forward on some misconception as to some of the facts. The question of damages *is* one of fact, and the cases hold that the trial court has more discretion in this area than in the area of liability, which involves a question of or questions of law.

Therefore, it is our judgment, and it is so ordered, that the trial court shall restore the verdict of the jury as to liability of the defendants. The trial court shall therefore reinstate the verdict insofar as it determines the several defendants to be liable. Since we are granting a new trial as to damages, the trial court shall proceed to try that part of the case. The plaintiff should be allowed to bring to the attention of the jury all of those matters that have been previously presented on liability that would have an effect on damages. It does not appear to be necessary to re-present this evidence. Most of it can be read to the jury or the jury could be allowed to see or read exhibits.

The trial court has previously commented on the need for organizing the evidence prior to further proceedings, and we do not wish to curtail this activity, but it is our view that insofar as possible, redetermination of issues already decided should be avoided so that the actual trial shall be as simple as possible. We repeat, that evidence which is relevant and material to the issues, including that evidence which reveals the nature of the activity of the defendants which caused the damage, and on the other side that evidence of the defendants which tends to mitigate the damages, should be fully presented.

The one particular part of the evidence which Daiflon claims it was prevented from developing and which appears to be relevant is that which concerned Daiflon's plans to construct a domestic refrigerant gas manufacturing facility. The court should carefully consider the bearing which this evidence might have on the measure of damages, and if it is shown to have relevance, it should be received. *See Wood Exploration & Production Co. v. Aluminum Co. of America,* 509 F.2d 784 (5th Cir. 1975).

The writ of mandamus shall therefore issue in accordance with the views set forth in the foregoing opinion.

Exhibit "A"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 72-483-B (Civil)

DAIFLON, INC., *Plaintiff*,

vs.

ALLIED CHEMICAL CORPORATION, et al, *Defendants*.

May 14, 1979

Court's Rulings and Comment on Defendants' Motions for Judgment N.O.V. and for New Trial

BOHANON, District Judge.

THE COURT: Well, the Court concludes that counsel have concluded your arguments.

Needless to say, the Court has struggled long and with difficulty over the Court's problem. You lawyers think you have problems. I was a lawyer a long time, and you do have problems. I used to think the courts didn't have any problems. They just sat there and took care of those matters like water off of a duck; but it isn't true. You stay awake. You work. You worry.

The Court has one object and only one object, and that is to see that the parties have a fair trial. No other object, no other interest, and no other concern.

I have reviewed all of the briefs, reviewed the file, and studied and analyzed the case as the evidence came forward.

The Court has concluded that the Court cannot, under any circumstances, grant judgment NOV, it just would not fit this case at all.

The Court further concludes and holds that the Court must vacate, and does vacate, the jury verdict.

The Court must and does grant a new trial.

I say this to you, Mr. Crawford, you are an exceedingly good lawyer, and you make a lot out of things that are really not important, as I view it from this evidence; but you had this jury in the palm of your hand almost from the beginning.

The Court finds and holds that the defendants were put at a great, great disadvantage, when you march into court on the day of trial, and I believe it was on Friday, and the time before the trial the defendants were complaining about not knowing what your evidence was going to be, what your documents were going to be.

Now the Court ordered the defendants, and they worked with you in good faith, and they opened their bowels and bared their chest and you got out of their files literally hundreds of exhibits. They were kept in the dark as to which ones of these you were going to use until Friday before the trial, and then the Court made certain orders, and we started the trial with literally dozens and dozens of exhibits that were not agreed to; and the Court had been open during all this period of time, after it came back, for the purpose of settling any issue; and the defendant came to me and said, "We are not getting this, we are not getting that out of the plaintiff, and what these exhibits are going to be."

The pretrial order was pretty plain: Everyone would know exactly what exhibits would be offered and what would not be offered.

Then the question of whether or not they were competent was never tried. We started this case with the defendant in the dark, and the Court in the dark; and the failure to get together on these exhibits put an exceedingly hard load on this Court, to say "This is in; this is out." And try the case day to day, hear the evidence, the Court gets tired just like lawyers do.

When the Court goes home at night, we can't do much more than say, "Well, I'm tired. I've got to go to sleep, get some rest for the next day's work" And that's what happened.

The Court has full and complete appreciation for the work of the jury in this case, and full regard for their stability in the solving of problems of this kind; but notwithstanding this appreciation and deep regard and concern with the work of the jury, the jury in order to do their functions must be adequately apprised of the tremendous problems. These kinds of cases are not easy cases, and particularly not easy for jurors where the issues are completely foreign to them. They don't understand about this gas business. After weeks of work they get to where they do.

The Court finds that there was not a fair trial, and this Court has a duty to see that there is a fair trial. The Court has no love for the defendants and no love for the plaintiffs in this case, but there was not a fair trial, say from beginning to end.

The Court would be less than honest if the Court let this verdict stand. The Court would be somewhat of a coward to let this verdict stand, under all of the evidence and all of the things that happened before and during the trial of the case.

Furthermore, the Court would be exceedingly lazy if he let it stand and refused to try the case again. It's a lot of work. The Court could easily say, "Well, let the verdict stand," and get out of the work; but this is not my duty. It's work. Of course it's work, but the Court must shoulder its responsibility as long as I sit on the bench.

When you consider the verdict, two and a half million dollars—when you consider that this company started out with a capital investment of $200,000 to get into a business that runs into the millions, it would be just like

me going out here and saying, "I'm going to go into the oil business, and I'm going to get a block and drill a well, on $100,000."

Why, you couldn't even get started.

The $200,000 that the plaintiff had wasn't enough to really get them started into breaking into this business, as long as the defendants were concerned about their business.

The defendants had a perfect right to meet competition, and for them not to meet competition is to deny them free enterprise.

This is what they did in places, but they did it in rare places, in Alabama, Houston, maybe in Oklahoma City—some little places where they met competition, but generally Daiflon was insignificant; and the Japanese treatment by this country, the surtax, and the exchange of the dollar —this had a tremendous amount of effect upon what happened to this plaintiff.

You can consider the earnings, 1969, 1970, 1971. If you consider the earnings, 1969, 1970, 1971, there is no basis upon these earnings by the company to project that they lost $2,500,000. Their earnings during these years were insignificant to say that builds into a judgment, a verdict, of two and a half million dollars.

What are the actual damages? There is nowhere it reaches two and a half million dollars.

Now the Act provides that where you find a conspiracy, and it is operation, why, for punishment the Court adds, triples it; but you can't say there's two and a half million dollars in damages from the years 1969- 1970 and 1971 operation.

Well, here is what the Court is going to do. The Court grants a new trial; and we are going to have a conference

where every exhibit to be used by either side will be passed on before we ever call a jury.

I am going to take time. We are going to have a conference. We can't have it this month. I don't think we can have it next month. I am moving my quarters right away up to the Fifth Floor, and I'll have in the future the Circuit court room up there; but I am going to set a date and a time when it is reasonably agreeable to counsel, and we are going over every exhibit. We are going to match it with the rules of evidence, and if it is admissible, we are going to put it over here; if it is not admissible we are going to put it over here, so to speak. These that are admissible, would be admitted. There will be no argument before the jury. There will be no time delay. There will be no headaches for the Court to pass upon as to what exhibits are to be received in evidence and what are not to be received in evidence.

Those that are to be received in evidence, and the depositions that are to be reread to the jury, we will know what they are and know where we are going from the very beginning.

Now I assume that the parties may, but I am going to ask now, do the parties want any further discovery, and if so, how much time do you want for discovery, or do you want to think about it and talk to the Court about it a little later on—a period of discovery. We are going to have a fixed time for further discovery.

I think perhaps we should either pass upon the great volume of exhibits before we go into further discovery, or vice versa. I don't know which would be the best—whether the egg before the chicken or the chicken before the egg; but you've got to have some discovery.

Some of these exhibits that the Court admitted, the Court erred in it. We erred seriously, and we erred because of the pressure that was put on the Court to conduct

a trial and to pass two hundred, three hundred exhibits, and the right to be admitted or not was wholly unfair to the Court. Just not fair to the Court. I sat here in this court room. We spent two hours passing on exhibits, and by the flip of the thumb I said, "This is in" and "This is not." I didn't know what I was talking about, because whether or not these exhibits come within the pale of the rule or not, why, there is no proof to show it.

These proofs of papers in the usual course of business, a lot of them were never identified by the custodian. A lot of them were not proved. They were just thrown in evidence.

It is not every piece of paper that you get out of a defendant's file that's admissible just because it has some inference about some question.

Well, the Court is absolutely not satisfied with it. The verdict of the jury, the Court was shocked when the verdict was read of $2,500,000 based upon the evidence before that jury, does not justify that kind of a verdict.

So does anyone have anything further to say? As quick as I can get settled down, why the Court will give you notice and we will begin shaping this case so that we can have a trial that the Court can say is and was a fair trial. The verdict may be more under new evidence than that allowed. It may be less. I don't know, don't care; but I will know in my own mind that there was a fair trial, and that these exhibits will not be a headache to the defendant, they will not be a headache to the Court. We can hear the evidence and let the jury hear the story, or the arguments and evidence on both sides.

If anyone has anything further to say, the Court will hear you. Otherwise we will take a recess until further notice through the Clerk.

(The proceedings are adjourned.)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November Term—December 21, 1979

DAIFLON, INC., *Petitioner,*

vs.

THE HONORABLE LUTHER BOHANON, Judge of the United States District Court for the Western District of Oklahoma, *Respondent.*

JUDGMENT AND WRIT OF MANDAMUS

No. 79-1459

(D.C. No. CIV 72-C-483-B)

Before The Honorable Robert H. McWilliams, Circuit Judge, The Honorable Jean S. Breitenstein, Circuit Judge, and The Honorable William E. Doyle, Circuit Judge

This cause came on to be heard on the narrative statements of the case filed by petitioner and respondent along lines provided in Rule 10(d) F.R.A.P. pursuant to order of court as a result of a petition for writ of mandamus and/or Writ of Prohibition seeking review of an order of the United States District Court for the Western District of Oklahoma granting a new trial in an antitrust case which had been tried to a jury. The cause was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of the trial vacating the verdict of the jury as to liability of the several defendants is reversed and that the writ of mandamus shall issue:

Therefore, it is our judgment, and it is so ordered, that the trial court shall restore the verdict of the jury as to liability of the defendants. The trial court shall therefore reinstate the verdict insofar as it determines the several defendants to be liable. Since we are granting a new trial as to damages, the trial court shall proceed to try that part of the case. The plaintiff should be allowed to bring to the attention of the jury all of those matters that have been previously presented on liability that would have an effect on damages. It does not appear to be necessary to re-present this evidence. Most of it can be read to the jury or the jury could be allowed to see or read exhibits.

The trial court has previously commented on the need for organizing the evidence prior to further proceedings, and we do not wish to curtail this activity, but it is our view that insofar as possible, redetermination of issues already decided should be avoided so that the actual trial shall be as simple as possible. We repeat, that evidence which is relevant and material to the issues, including that evidence which reveals the nature of the activity of the defendants which caused the damage, and on the other side that evidence of the defendants which tends to mitigate the damages, should be fully presented.

The one particular part of the evidence which Daiflon claims it was prevented from developing and which appears to be relevant that which concerned Daiflon's plans to construct a domestic refrigerant gas manufacturing facility. The court should carefully consider the bearing which this evidence might have on the measure of damages, and if it is shown to have relevance, it should be received. *See* Wood Exploration & Production Co. v. Aluminum Co. of America, 509 F.2d 784 (5th Cir. 1975).

The writ of mandamus shall therefore issue in accordance with the views set forth in the foregoing opinion.

/s/ Howard K. Phillips,
Howard K. Phillips, *Clerk*

APPENDIX C

January Term—March 5, 1980

No. 79-1459

DAIFLON, INC., *Petitioner,*

vs.

THE HONORABLE LUTHER BOHANON, Judge of the United States District Court for the Western District of Oklahoma, *Respondent.*

Before Honorable Oliver Seth, Chief Judge, Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges

This matter comes on for consideration of the petition of respondent for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, it is ordered:

1. The petition for rehearing is denied by Circuit Judges McWilliams, Breitenstein and Doyle, the panel to whom the case was argued and submitted.

2. The Clerk having transmitted the suggestion for rehearing en banc to the members of the panel and the judges of the Court who are in regular active service (except Judge William J. Holloway, Jr., who is recused and who did not participate) and no judge in regular active service nor judge who was a member of the panel that rendered the decision sought to be reheard having requested a vote on the suggestion, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, *Clerk*

APPENDIX D

MAY TERM—AUGUST 10, 1979

Before Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein, and Honorable William E. Doyle, Circuit Judges.

No. 79-1459

DAIFLON, INC., *Petitioner,*

vs.

THE HONORABLE LUTHER BOHANON, Judge of the United States District Court for the Western District of Oklahoma, *Respondent.*

The matter is before this Court on the petition of Daiflon, Inc. seeking a writ of mandamus or a writ of prohibition against the respondent trial judge, the Honorable Luther Bohanon.

On May 14, 1979, the trial court herein entered its order granting a new trial to all of the defendants in the above-entitled case. This order also set aside a very substantial jury verdict.

The matter has been extensively briefed, and the briefs include statements of the case. However, this Court is asked to judge the exercise of discretion on the part of the trial judge without having a record or a statement of evidence with which to measure the action taken by the trial court.

Accordingly, the parties are directed, in lieu of a transcript of the evidence, to prepare and sign a narrative statement of the case along the lines provided in Rule 10(d) of the Rules of Appellate Procedure. Each side shall prepare a summary of the evidence presented by it at the trial. These summaries shall be simultaneously prepared and shall be simultaneously submitted on or before September 11, 1979.

This matter shall be orally argued and presented by counsel to Division I of this Court in Denver, Colorado, on Tuesday, October 9, 1979, at 10:00 a.m.

It is the further order of the Court that proceedings in the appeal of the defendants from the judgment entered and from the order denying the motion for judgment not withstanding the verdict entered in this action on May 14, 1979, (presently Undocketed Appeal No. 24 in this Court) are suspended pending the disposition of the petition for writ of mandamus or prohibition.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-72-483-B

DAIFLON, INC., *Plaintiff*,

vs.

ALLIED CHEMICAL CORPORATION, et al, *Defendants*.

ORDER

Filed April 7, 1980

The court has reviewed its notes of the evidence and testimony in the above-entitled cause and the briefs of the parties, and has carefully considered the substance and tenor of the circuit court's opinion in Daiflon, Inc. v. The Honorable Luther Bohanon, No. 79-1459 (10th Cir. Dec. 21, 1979).

The trial court is charged in the aforesaid Opinion of the United States Court of Appeals for the Tenth Circuit (hereinafter Opinion) with perhaps being an advocate in favor of the defendants. The circuit court arrives at this conclusion, in part, by reading between the lines.[1] Further, the trial court is charged for oversight in failing to enter a formal order[2] and for not giving sufficient reason for vacating the jury verdict as to the matter of liability.[3] From this perspective, it seems perfectly clear to this court that considerable reason and justification for the granting of the motion can be found in the transcript appended to the circuit court's opinion. Clarification of the

---

[1] Opinion at 6 and 18.

[2] Opinion at 6.

[3] Opinion at 22.

trial court's reasons, other than given, would have gladly been furnished upon request.

The trial court, in sustaining the defendants' motion for new trial, noted:

> (a) that there had not been a fair trial;[4]
>
> (b) that the court confessed error in admitting certain exhibits, to which the court after this period of reflection contends substantially affected the rights of the parties.[5] Said exhibits were not properly identified for admission under Rule 803(6), Federal Rules of Evidence.

The trial court saw and heard all the evidence (approximately four weeks of trial) and had a clear understanding of the evidence and issues before the jury; and based upon what the trial court knew, it had to, in honesty, grant defendants' motion for new trial as to all issues. The court unequivocably stated that to permit the verdict to stand and not grant a new trial, the court would be dishonest and cowardly.[6] What more can a judge say regarding his feelings that a new trial was required? The court observed that if it did not grant a new trial, it would have been exceedingly lazy.[7] What more can a judge say to show his feelings that a new trial was essential for justice to be done in this case?

This court specifically noted that it had no interest in who won or lost the case, but only in seeing that each party was afforded a fair trial, and that the ends of justice were met. This trial court has never in 19 years on the bench ever favored one party over another.

---

[4] Appendix to Opinion at 4.

[5] Appendix to Opinion at 7.

[6] Appendix to Opinion at 4.

[7] Appendix to Opinion at 5.

Nor can the court candidly state that its refusal to grant defendants a judgment notwithstanding the verdict (Judgment N.O.V.) should be considered any proof of the liability of the defendants, as urged by the circuit court.[8]

This court is ordered to accept the verdict of the jury as to liability of defendants and to try the case again as to the amount of damages. The district court does not set to review and reverse the judgments of the court of appeals.[9] A district court is required to follow the mandate of a court of appeals and may not take action inconsistent with it.[10]

If this court were to retry the cause on the basis of the mandate, for the reasons hereinbefore stated, it could not be satisfied with the result. The court is passionately convinced that the issue of liability has not been proven, though there exists some evidence otherwise. Further, any verdict of damages must be founded upon a totality of the evidence—including that evidence bearing upon the question of liability.

This court is not moved to any degree by the personal charges made by plaintiff counsel in its mandamus action before the circuit court; nor is this court moved by the threats in plaintiff counsel's letter of March 26, 1980. The question of the trial court's bias and prejudice was squarely before the circuit court in the mandamus action, and the request to remove the trial court from this case was denied, or at least not acted upon, distinguishing this case from *Webbe v. McGhie Land Title Co.*, 549 F.2d (10th Cir. 1977) and the *United States v. Ritter*, 540 F.2d 459 (10th Cir. 1976). This court had desired to wait until all appellate issues had been settled before withdrawing, but

---

[8] Opinion at 21.

[9] *Lacob v. United States*, 59 F.R.D. 329 (N.D. Ill. 1973).

[10] *Paull v. Archer Daniels-Midland Co.*, 313 F.2d 612 (5th Cir. 1963).

time did not permit in light of the correspondence of counsel, which is filed with the Clerk of the Court. If this court tried this case again, the provisions of 28 U.S.C.A. § 455 and § 144 would not be violated, and it is not because of these threats that this court withdraws, but rather because of the mandate.

This court respectfully withdraws from this cause and asks to be relieved from all duties in connection therewith. Said withdrawal is not based upon any feeling of prejudice or interest, accusations intimated in the circuit court's opinion and in the charges—pro and con—in the correspondence between counsel and the court. Said request of withdrawal is based wholly upon the reasons herein stated.

IT IS SO ORDERED.

Dated this 7th day of April, 1980.

/s/ LUTHER BOHANON
United States District Judge

APPENDIX F

Statutory Provisions Involved

All Writs Act, 28 U.S.C. 1651(a):

> (a) The Supreme Court and all courts established by Act of Congress may issue all write necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 1 of the Sherman Act, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil No. 72-C-483-B

DAIFLON, INC., *Plaintiff*,

v.

ALLIED CHEMICAL CORPORATION, et al., *Defendants*.

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

TABLE OF CONTENTS

		Page
I.	The Background Facts	2*
II.	Plaintiff Failed To Produce Substantial Evidence of Monopolization or Attempted Monopolization by Du Pont	5
	A. The Relevant Market Is National in Scope	6
	B. Plaintiff Failed To Show that Du Pont Possessed Monopoly Power in the Relevant Market	9
	1. Du Pont's Market Share Is Such As To Preclude a Valid Finding of Monopoly Power	9
	2. Du Pont Lacked Power To Control Prices or Exclude Competitors	16

* Page reference refer to pages of memorandum as originally filed. Bracketed numbers in text also refer to pages of memorandum as originally filed.

C. There Is No Evidence of the Exercise by Du Pont of Monopoly Power 21

D. Plaintiff Also Failed To Produce Substantial Evidence of Attempted Monopolization by Du Pont 27

III. Plaintiff Failed to Produce Substantial Evidence of Conspiracy 31

A. The List Price Reduction First Implemented by Du Pont in March 1971 Was the Product of Competition Rather than of Conspiracy 32

B. There Was No Other Credible Evidence At Trial of the Alleged Conspiracy 39

1. The opportunity to conspire 39

2. Market intelligence activities 40

3. Distribution patterns 41

4. Late 1972 price increases 42

IV. All Defendants Are Entitled To Judgment Because of Plaintiff's Failure To Prove Impact and Damages 44

A. Gup Was Not Competent To Introduce the Conclusions of Another Expert (Iskander) .. 45

B. Gup's Damage Theory Improperly Assumed a Daiflon Sales Price Prevailing During Defendants' Alleged Conspiracy To Raise Prices 45

C. Gup's Damage Theory Falls Also Because He Was Completely Wrong About One of The Most Important Facts—The Market Share that Daiflon Actually Had Attained—Underlying His Theory 46

D. Gup's Damage Theory Rests on the Patently Untenable Assumption that Daiflon Would

Have Performed Like a Broad Spectrum of Big American Companies in All Their Operations 47

E. Even If Gup Had Been Right in Everything Else, He Did Not Take Into Account the Import Surcharge and the Devaluation of the Dollar, Which Eat Up All of Daiflon's Assumed Net Income With Something To Spare 50

CONCLUSION 52

The legal standards applicable to a motion for judgment n.o.v. are well settled. Although entitled to all reasonable inferences, plaintiff still has the burden of establishing a prima facie case in responding to a motion for judgment n.o.v. *Barnett* v. *Life Ins. Co. of the Southwest,* 562 F.2d 15, 17 (10th Cir. 1977). An antitrust plaintiff is not entitled to go to the jury, and cannot support a favorable verdict, "on the basis of speculation, surmise or conjecture." *Independent Iron Works, Inc.* v. *United States Corp.,* 177 F.Supp. 743, 746 (N.D. Cal. 1959), *aff'd,* 322 F.2d 656 (9th Cir.), *cert. denied,* 375 U.S. 922 (1963). As the Supreme Court pointed out in *Galloway* v. *United States,* 319 U.S. 372, 395 (1943):

> "[T]he essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Furthermore, the question presented by a motion for judgment n.o.v. is not

> "whether there is no evidence supporting the party against whom the motion is made, but whether there

is evidence upon which the jury could probably find a verdict for that party."

[2] *Yazzie* v. *Sullivent*, 561 F.2d 183, 188 (10th Cir. 1977). This means that a jury verdict can be sustained only if there is substantial evidence to support it—that is, " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 853 n. 2 (9th Cir. 1977), *cert. denied*, 99 S.Ct 103 (1979), quoting from *Washington* v. *United States*, 214 F.2d 33 (9th Cir.), *cert. denied*, 348 U.S. 862 (1954).

The essential findings challenged in this motion are (1) that defendants engaged in an unlawful conspiracy to drive plaintiff out of business, (2) that defendant Du Pont monopolized, or attempted to monopolize, the non-automotive replacement market for refrigerant gas and (3) that plaintiff suffered damages in the amount of $2,500,000 as a consequence of such unlawful acts. As demonstrated below, plaintiff has failed to produce a substantial evidence showing *either* that the defendants, or any one of them, violated some provision of the antitrust laws *or* that plaintiff has suffered measurable damages as a result of acts attributable to any of the defendants. Such failure of proof requires that judgment n.o.v. be entered for defendants.

I. The Background Facts

Plaintiff, Daiflon, Inc., was formed for the purpose of importing refrigerant gas from Japan, repackaging this gas in smaller cylinders, and selling it in the United States. Carter, Tr. 147. Daiflon commenced operations in early 1969, imported refrigerant gas until August 1971, and made its last sale in October 1972. Carter, Tr. 99, 104.

Daiflon's Japanese supplier was unable to provide it with adequate amounts of gas in 1969 and 1970; neverthe-

less, at no time during its existence did Daiflon ask any of the defendants—the domestic manufacturers of refrigerant [3] gas—to sell it any grade of gas. Carter, Tr. 148, 343. Mr. Richard Carter, plaintiff's president, testified that by early 1971 Daiflon's supply problems had been solved, and that Daiflon then had a viable business. Carter, Tr. 103. The value of the business at that time, as reflected in a contemporaneous stock sale as well as in statements and analyses that were *not* prepared for purposes of this litigation, was $200,000. Carter, Tr. 254; McDonald, Tr. 523, 554, 572-576; Def. Exh. Nos. 7, 8.

In August 1971, the President of the United States imposed a 10 percent surcharge of all imports from Japan and other countries. Carter, Tr. 176-177; Def. Exh. No. 6. The effect of the surcharge of Daiflon's importing business was "disastrous." Carter, Tr. 213. Daiflon did not place any orders for refrigerant gas with its Japanese supplier after that time. Carter, Tr. 214-215. This surcharge remained in effect until December 1971, when it was replaced by new exchange rates involving the dollar, the Japanese yen and other currencies. As of December 15, 1971, the devaluation of the dollar as against the Japanese yen had the effect of increasing by some 17 percent the cost of imported Japanese goods, including refrigerant gas. Bradfield, Tr. 28.

Mr. Carter and Mr. R. D. McDonald, the primary investor in Daiflon, testified that, even before these cost increases, Daiflon's costs were higher than those of the domestic manufacturers. Carter, Tr. 154-155; McDonald, Tr. 586-587. During the four years of its existence, Daiflon sold a total of some 2.4 million pounds of refrigerant gas, which was less than ¼ of one percent of the total sales of refrigerant gas in the United States during that period. Hibdon Direct, Tr. 34; Def. Exh. No. 91. At no time did Daiflon realize a profit on its refrigerant gas business. Carter, Tr. 275-285.

[4] The defendants are the six domestic manufacturers of refrigerant gas. Du Pont was the first entrant into this business. Until 1949 patents covering refrigerant gas products legally precluded the sale of refrigerant gas in the United States by any other person. After the original patents expired, the other defendants entered this business. Allied Chemical was the first new entrant, in 1952; Racon was the last of the defendants to commence the manufacture and sale of refrigerant gas, doing so in 1965. In 1977, Union Carbide ceased manufacturing refrigerant gas. Hibdon Direct, Tr. 11-12; Pl. Exh. No. 1113, pp. 15-16.

It is undisputed that refrigerant gas is a homogeneous, fungible product—that is, the gas produced by any defendant is chemically identical to the gas produced by any other defendant. Rose, Deposition 47; Hibdon Direct, Tr. 10, 23-24. The economic implication of this fact is also undisputed. The economists who appeared were unanimous in stating that, because of the homogeneous nature of refrigerant gas, one would expect substantial similarity in refrigerant gas prices among the defendants. The reason is that no purchaser would pay any defendant more for its refrigerant gas than it had to pay to obtain the refrigerant gas of any other defendant. Hibdon Direct, Tr. 10-11, 24; Gup., Tr. 1075-1077; Jadlow, Tr. 1169, 1172-1173.

This did not mean, however, that there was no price competition among the defendants. On the contrary, while the list prices of each defendant were similar, there was substantial discounting off list prices. Hibdon Direct, Tr. 28-29. In addition, there were other competitive activities that affected the prices paid by various of the defendants' customers. This price competition was intense throughout the 1969-1972 period, throughout the United States. Hibdon Direct, Tr. 9, 20, 28-29, 36-38.

[5] Plaintiff's claim is that it was forced to begin liquidating its business operations in August 1971 because of a 13 percent reduction in the defendants' list prices in the

spring of 1971. Carter, Tr. 110-112; McDonald, Tr. 538, 597. It claims that this general reduction in list prices was the result of a conspiracy among the defendants to drive it out of business. It also claims that Du Pont's pricing practices independently violated Section 2 of the Sherman Act.

We begin by showing that plaintiff tendered no evidence to support the latter claim. We then show that there was also a complete failure of proof on the conspiracy issue. Finally, we show the lack of any probative evidence to support any award of damages to Daiflon, much less the jury's determination that plaintiff's damages were $2,500,000 before trebling.

II. Plaintiff Failed To Produce Substantial Evidence of Monopolization or Attempted Monopolization by Du Pont

The essential elements of a monopolization charge are "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 791 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977), citing *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). A case of attempted monopolization, by contrast, requires "proof [1] that the defendant's conduct was motivated by specific intent to monopolize and [2] that a dangerous probability of monopoly power existed." *Ibid.*, citing *E. J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d 296 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976). Plaintiff's proof with respect to each of [6] these elements fell far short of the required showing. Indeed, the evidence at trial absolutely precluded a finding of monopolization or attempted monopolization by Du Pont.

A. *The Relevant Market Is National in Scope*

Plaintiff's expert economist, Dr. Joseph Jadlow, testified that, in his opinion, the relevant market "would probably be the non-automotive aftermarket for refrigerant gas." Jadlow, Tr. 1158. This is the market in which Daiflon sold refrigerant grades 11, 12 and 22. Carter, Tr. 321. Du Pont did not dispute that conclusion—and the Court's instructions, as well as the special verdict form that was submitted to the jury, reflected the parties' agreement that the relevant product market consists of refrigerant gas used in the non-automotive replacement market.

The only evidence on the question of the geographic scope of the relevant market established that it was a national market. Dr. Jadlow so testified (Tr. 181):

> "Q. Now, I believe you defined the relevant market, as you view it, as the non-automotive replacement market for refrigerant gas.
>
> "A. Yes. * * *
>
> "Q. That would be a product market throughout the United States?
>
> "A. Yes."

Dr. Jadlow's testimony on this issue was consistent with the testimony of company witnesses whose depositions were read by plaintiff. Mr. Robert Wright, Marketing Manager for Refrigerants at Du Pont, testified that Du Pont refrigerants are distributed to the non-automotive replacement market on a national basis and that Du Pont's list prices apply throughout the United States. *E.g.*, Wright, Deposition 194-198. Representatives of Allied Chemical, Union Carbide and Kaiser also testified that the refrigerant distribution policies of their respective companies encompassed the entire United States—and with the [7] exception of instances involving isolated competitive offers to individual customers, that their company

pricing policies reflected national, rather than regional, marketing conditions.[1]

The evidence at trial thus showed a national market for refrigerant gas used for non-automotive replacement purposes. As in *United States* v. *Grinnell Corp., supra,* 384 U.S. at 576, the evidence in this case was of a business "operated on a national level," with "national planning"; each of the defendants had "a national schedule of prices * * * and terms," which occasionally were "varied to meet local [competitive] conditions"; indeed, in light of the evidence at trial, only a national market "reflects the reality of the way in which [the defendants, including Du Pont] built and conducted their [replacement refrigerant] business." *See also, e.g., Tampa Elec. Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (1961); *Standard Oil Co.* v. *United States,* 337 U.S. 293, 299 n. 5 (1949); *United States* v. *Empire Gas Corp.,* 537 F.2d 296, 304 (8th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977); *Castlegate, Inc.* v. *National Tea Co.,* 34 F.R.D. 221, 223 (D. Colo. 1963).

There was no competent evidence at trial of a market having a more limited geographic scope. Although Mr. Carter and Mr. Bus Adams testified that plaintiff sold its replacement refrigerant products in approximately 31 states at various times during the 1969-1972 period (Carter, Tr. 603; Adams, Tr. 647-648), that testimony was totally insufficient to establish that the relevant market was limited to those states.

In assessing claims that a particular market is limited to a specific region or locality, the courts have **[8]** focused on two factors: (1) the extent to which the defendants are unable, as a practical matter, to sell the relevant product outside the region or locality because of high transportation costs and (2) the extent to which buyers are unable to

---

[1] *E.g.*, Regan, Deposition 19-24; Napoli, Deposition 7, 131, 152; Sorensen, Deposition 20-23.

go to sellers located outside the region or locality to obtain the product. *E.g., United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 357 (1963); *Tampa Elec. Co.* v. *Nashville Coal Co., supra*, 365 U.S. at 327; *Honeywell Inc.* v. *Sperry Rand Corp.*, 1974-1 Trade Cas. ¶ 74,874 (D. Minn. 1973); *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 456 (9th Cir. 1966), *cert. denied*, 387 U.S. 932 (1967). There was no evidence in the present case that transportation costs prevented any of the major sellers of refrigerant gas from selling that product in other than the states in which plaintiff actually made sales. Neither was there evidence showing that individual purchasers were unable to obtain refrigerant gas from other than regional or local sources. The evidence was, in fact, to the contrary —that is, there was ample testimony showing that most wholesalers of refrigerant gas purchased from one or more of the defendants, each of which operated on a national scale. *See, e.g.*, Lynn, Deposition 19-21; Dailey, Deposition 19.

In short, if plaintiff intended at trial to carve out a regional market for the purpose of its monopolization and attempted monopolization claims against Du Pont, it failed to accomplish that objective.[2]

---

[2] During discussions with the Court in connection with the framing of instructions, Mr. Gregory, one of plaintiff's counsel, appeared to suggest that the jury could infer from the fact that plaintiff actually had sold refrigerant in 31 states that the relevant market is limited to those states. That suggestion is, of course, untenable. If the suggestion were accepted, an antitrust plaintiff could concentrate its sales efforts in those local areas in which a high percentage of the sales were being made by a particular company—and, by means of such manipulation, make the target company vulnerable to a monopolization charge. The test for the geographic component of the relevant market focuses on market realities; for good reason, the efforts of an individual plaintiff to limit its claim to areas having no separate economic significance are entitled to no weight. *See, e.g.*, Telex Corp. v. International

[9]

B. *Plaintiff Failed To Show That Du Pont Possessed Monopoly Power in the Relevant Market*

Monopoly power is defined generally as the "power to control prices or to exclude competitors" in a relevant market. *E. g., Telex Corp.* v. *International Business Machines Corp., supra,* 510 F.2d at 914. Whether a particular antitrust defendant possesses monopoly power often involves a complicated factual inquiry, requiring an assessment of the strength and vigor of the defendant's competitors as well as the existence of barriers to entry that might prevent new firms from entering the market. No such inquiry is required here, however, because the size of Du Pont's market share during the period of plaintiff's existence absolutely precludes, as a matter of law, a valid finding of monopoly power.

1. Du Pont's Market Share Is Such As To Preclude a Valid Finding of Monopoly Power

The courts have held on numerous occasions that "control of less than 50 percent of the relevant market is by itself sufficient evidence that monopoly power does not exist." J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 8.02[2], pp. 8-34 and 8-34.1 (1979 ed.). In fact, in those instances in which the Supreme Court has sustained findings of monopoly power, the market shares involved have [10] ranged from a minimum of 70 percent (*United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131

Business Machines Corp., 510 F.2d 894, 917 (10th Cir. 1975), *cert. dismissed,* 423 U.S. 802 (1976).

Of course, if this Court should conclude that the relevant market is limited to the 31 states in which plaintiff sold refrigerant gas at some time during the period of its existence, that conclusion would not benefit plaintiff since there was no evidence, of any sort, of Du Pont's market share in those states. See discussion at pp. 12-15 *infra.*

(1948)) to a high of 90 percent (*Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911)). As the Supreme Court explained in *United States* v. *United States Steel Corp.*, 251 U.S. 417, 444 (1920), in discussing the significance of a substantially larger market share than plaintiff established here:

> "The power attained was much greater than that possessed by any one competitor—it was not greater than that possessed by all of them. Monopoly, therefore, was not achieved. * * *"

Accord, e.g., Holleb & Co. v. *Produce Terminal Cold Storage Co.*, 532 F.2d 29, 33 (7th Cir. 1976) (monopolization claim rejected since, even assuming the appropriateness of the market plaintiff had alleged, plaintiff failed to prove that defendant "had a dominant share exceeding 60% of the market"); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264, 1274 (9th Cir. 1975) (50 percent market share insufficient to establish monopoly power); *Telex Corp.* v. *International Business Machines Corp., supra*, 510 F.2d at 915-16, 919 (36.7 percent of the relevant market "is insufficient to justify any inference or conclusion of market power", and further quoting with approval, "something more than 50% of the market is a prerequisite to a finding of monopoly"); *White Bag Co.* v. *International Paper Co.*, 1974-2 Trade Cas. ¶ 75,188 (4th Cir. 1974) (tabulation of cases revealed monopoly power is found only when share of relevant market is 70 percent or more); *Continental Baking Co.* v. *Old Homestead Bread Co.*, 476 F.2d 97, 104 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973) ("[I]t is fairly clear that a market share of fifty-one percent would not constitute monopoly power."); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203, 207 n. 2 (5th Cir. 1969) ("It appears that something more than 50% of the market is a prerequisite **[11]** to a finding of monopoly."); *United States* v. *Aluminum Company of America*, 148 F.2d 416, 424 (2nd Cir. 1945) (Over 90 per-

cent of the relevant market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."); *Nankin Hosp.* v. *Michigan Hosp. Service*, 361 F. Supp. 1199, 1209 (E.D. Mich. 1973) (market share below 50 percent insufficient to show monopoly power).

The evidence at trial showed that Du Pont's share of the non-automotive refrigerant gas replacement market during the 1969-1972 period was approximately 40 percent. That is well below the 50 percent figure that, in the Tenth Circuit as elsewhere, has been held "by itself" to be "sufficient evidence that monopoly power does not exist." Von Kalinowski, *Antitrust Laws and Trade Regulation, supra.* The most reliable evidence of Du Pont's market share during the relevant period is probably the Du Pont Business Plan, which was prepared for internal use by Du Pont in November 1971. Du Pont's share of the non-automotive refrigerant gas replacement market is estimated in the Business Plan to have been 39 percent as of 1971. Pl. Exh. No. 1113, p. 13. This is consistent with the estimate of Du Pont's market share contained in the Marketing Plans of Pennwalt for the years 1971 and 1972; according to the Pennwalt Marketing Plans, Du Pont's share of the replacement market in 1971 was approximately 40 percent and in 1972 was approximately 38 percent. Pl. Exh. No. 4146, p. 5; Pl. Exh. No. 4196, p. 4.[3]

Although there was no evidence that Du Pont's share of the refrigerant gas replacement market approached 50 percent during the 1969-1972 period, one of the jury's **[12]** findings, as reflected by the special verdict form, purported to find to the contrary. Verdict Form, Finding No. 3. This finding cannot be sustained in view of the total

---

[3] It also is consistent with the estimate of Du Pont's market share provided by officials of Allied Chemical, Kaiser, Union Carbide and Racon. Regan, Deposition 96; Sorenson, Deposition 158; Napoli, Deposition 125; Knopf, Deposition 96.

absence of record evidence to support it. Indeed, the finding could only have been based on the mischaracterization of market share evidence by plaintiff's counsel during closing arguments.

At two points during his closing argument, plaintiff's counsel stated that there was evidence that would support a finding that Du Pont's share of the refrigerant gas replacement market exceeded 50 percent. Near the outset of his argument, plaintiff's counsel referred to a Union Carbide document that, according to counsel, "shows that Du Pont's share of the 22 market was 53 percent * * *." Crawford, Tr. 1494. But plaintiff made no effort to establish by evidence at trial that the relevant product market was limited to grade 22 refrigerant gas; there was no evidence at all tending to show that it would be appropriate to treat any single type of refrigerant gas as a relevant market, and plaintiff's counsel never even argued that issue to the jury. Moreover, the Union Carbide document relied upon by plaintiff's counsel was not limited to the non-automotive replacement market. Rather, it dealt with market share for all end uses in the aggregate—which means that it included fluorocarbons sold as aerosol propellants, foaming agents, solvents and resins, in addition to refrigerant gas sold to original equipment manufacturers and for replacement purposes. Pl. Exh. No. 4500, p. 5. Accordingly, the 53 percent market share figure referred to by counsel cannot support any finding that in the non-automotive replacement market Du Pont had a greater than 50 percent share of any or all refrigerant gas sales.

Plaintiff's counsel also relied during closing arguments on the testimony of Mr. Bus Adams for the proposition that Du Pont's share of the relevant market during the [13] 1969-72 period exceeded 50 percent. According to counsel:

> "Now, one thing about Mr. Adams[']s testimony that I wanted to testify to, or I want to advise you of and

request that you consider, is that Mr. Adams stated that he traveled throughout these whole 31 states and Puerto Rico, and you know that he did, * * * but he also testified that he understood the territory, he understood the competition, and his estimate was that Du Pont had over 50 percent of the refrigerant gas aftermarket in that market area, in that relevant market, and there has been no testimony in this matter to refute that, and it stands unrefuted, and it's the truth." Crawford, Tr. 1507.

The testimony by Mr. Adams referred to was not accurately described by counsel, and, in any event, the testimony is both irrelevant and demonstrably unreliable. As already noted, there is no basis for concluding that the relevant geographic market for the purpose of this case is anything but national in scope. But, in addition, the cross-examination of Mr. Adams demonstrated beyond peradventure that Mr. Adams' statements concerning Du Pont's market share amounted to no evidence at all, much less substantial evidence. During cross-examination, Mr. Adams testified as follows:

"Q. Now, you testified yesterday as to the apparent comparative volume of refrigerant gas of Du Pont as compared to the sales volume of the other defendants.

Was that testimony based on any survey that you conducted?

"A. No, sir, it came from individuals that I knew from the past years.

"Q. Was this an individual at Pennwalt that told you that?

"A. No, sir.

"Q. Individual at Du Pont?

"A. No, sir.

"Q. Individual in any one of these companies?

"A. It was an individual of some of your largest distributors.

[14] "Q. * * * So it's information that came to you from some customers; is that right?

"A. Yes, sir.

"Q. All customers or just some?

"A. Oh, I would say I could name you about three or four.

"Q. Is that the basis for your testimony?

"A. Well, observing is very good.

* * *

"Q. I asked whether you went into the backroom of wholesalers or contractors' offices and counted up the number of Pennwalt cylinders, the number of Carbide cylinders, and that's how you decided. Did you do that?

"A. No. I did not go back and count them, no, sir.

"Q. Did you ask people that you called on where they bought their refrigerants from?

"A. I may or I may have not.

"Q. You don't remember?

"A. No, sir."

Adams, Tr. 772-774.

Following this exchange, plaintiff's counsel asked Mr. Adams on redirect to estimate Du Pont's market share in the area in which Daiflon was operating. Mr. Adams responded as follows:

> "I would say du Pont's sales [were] over 50 percent of the customers that I called on, and I talked to presidents of the companies that told me what purchases they bought." Adams, Tr. 775.

It is thus apparent that plaintiff's counsel mischaracterized Mr. Adams' testimony in suggesting that Mr. Adams had stated that Du Pont "had over 50 percent of the refrigerant gas after-market" in the 31 states in which plaintiff actually made refrigerant gas sales during the 1969-1972 period. In fact, Mr. Adams' testimony was that Du **[15]** Pont's sales were "over 50 percent of the customers that [he] called on" (Adams, Tr. 775)—a group that hardly amounts to a relevant market. Moreover, it is difficult to conceive of less reliable evidence of Du Pont's sales to even these isolated, and unnamed, customers than is provided by Mr. Adams' testimony.

Mr. Adams conceded on cross-examination that his market share estimate was not based on any survey he had undertaken or on conversations he had had with representatives of any of the defendants. Although he appeared at one point to testify that his estimate was based on conversations with three or four Du Pont customers concerning their own purchases, he stated subsequently that he did not remember whether he had asked people on whom he called for information as to the sources of their refrigerant purchases. It is, of course, impossible to reconcile this statement with Mr. Adams' statement on redirect examination that he had "talked with presidents of the companies that told me what purchases they bought." Adams, Tr. 775. Finally, although Mr. Adams suggested that his estimate of Du Pont's market share might be based on "observing" (Tr. 773), he later testified that he did not go into the backroom of wholesalers or contractors and count the number of cylinders in stock from the various manufacturers.

In short, although the mischaracterization by plaintiff's counsel of Mr. Adams' testimony may explain the jury's finding that Du Pont's share of the non-automotive refrigerant gas replacement market exceeded 50 percent during the 1969-1972 period, the testimony itself is a wholly inade-

quate predicate for an antitrust verdict. The only credible evidence in the present record of Du Pont's share of the relevant market places it at approximately 40 percent. As a matter of law, a market share of 40 percent is insufficient to permit a finding a monopoly power.

[16] 2. Du Pont Lacked Power To Control Prices Or Exclude Competitors

Of course, even if one assumes, contrary to the evidence, that Du Pont's share of the relevant market during the 1969-1972 period was greater than 50 percent, that would not necessarily mean that Du Pont possessed monopoly power. Once a company's market share has been shown to exceed 50 percent, the law requires that an assessment be made to determine whether, in view of other industry characteristics, the company has the power "to control prices or to exclude competition." *Telex Corp.* v. *International Business Machines Corp., supra,* 510 F.2d at 914. Even if Du Pont's minority market share is ignored, the evidence at trial showed conclusively that Du Pont did not possess any such power.

A company cannot be said to have monopoly power over price unless it has the power to charge prices for its products substantially without regard to competitive conditions and without having to take into consideration the prices of its competitors' products. *E. g., Continental Baking Co.* v. *Old Homestead Bread Co., supra,* 476 F.2d at 104; *Cole* v. *Hughes Tool Co.,* 215 F.2d 924, 938 (10th Cir. 1954). To put the matter another way, a company does not have monopoly power over price unless it has substantially unbridled discretion to charge a premium for its products —and thereby, at its option, to reap monopoly profits. *E.g., Janich Bros., Inc.* v. *American Distilling Co., supra,* 570 F.2d at 856; *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d at 797. If, on the other hand, there is—as Dr. Jadlow, plaintiff's economic expert,

testified—"price competition, true price competition, * * * that is not a monopoly market." Jadlow, Tr. 1186.

[17] The present record is devoid of any evidence tending to show that Du Pont had sufficient market power to be able to charge prices for its refrigerant products in the non-automative replacement market without regard to the prices charged by its competitors. In fact, the evidence showed overwhelmingly that any effort by Du Pont to charge a higher price than any of its competitors would have resulted in lost sales and market share by Du Pont—hardly the kind of penalty a monopolist would suffer. Thus, one of the options discussed in the Du Pont Business Plan for 1971 was to "[i]ncrease prices and/or resist lower prices offered to key accounts by competition." This option was rejected by Du Pont because, as stated in the Business Plan, "[a]ttempts to increase prices or resist lower competitive price offerings at this time would lead to a loss in market position and have a detrimental effect on long-term earnings." Pl. Exh. No. 1113, p. 21.

This assessment of Du Pont's lack of significant market power was echoed by numerous witnesses at trial. Mr. Robert Wright of Du Pont testified, for example, that one of the primary reasons Du Pont lowered its list prices for replacement refrigerants in March 1971 was that "it was quite evident that we were not competitive at a number of wholesalers, and as such [Du Pont] was being penalized in penetration * * *." Wright, Deposition 187. So far as the March 1972 price decrease, initiated by Allied Chemical, was concerned, Mr. Wright observed that "we would have been very pleased to have been able to get the price up, and at least gain some of our profit back. Competitive conditions certainly precluded this, in our best judgment." *Id.* at 114; [18] *see also* O'Donnell, Deposition 36-41; Hibdon Direct, Tr. 10-11, 24.[4]

---

[4] Plaintiff's counsel argued at length in his closing arguments that Du Pont was a "price leader" in the refrigerant gas in-

An alternative way of looking at a company's market power, suggested by plaintiff's expert economist, Dr. Jadlow, is to assess the extent to which the company is subject to "price competition, true price competition." Jadlow, Tr. 1186. The existence of vigorous price competition is, of course, inconsistent with the possession of monopoly power over price. If a company must adjust its prices downward in response to lower-price competitive offerings in order to avoid a loss of sales, that company lacks the kind of control over prices that is encompassed by the phrase "monopoly power." *E.g., Telex Corp.* v. *International Business Machines Corp., supra,* 510 F.2d at 914.

There was overwhelming evidence at trial of vigorous price competition in the sale of replacement refrigerants, and undisputed evidence of Du Pont's vulnerability to that competition. In addition to acknowledging Du Pont's inability to "increase prices and/or resist lower prices offered to key accounts by competition" without a significant loss of sales and market share, the Du Pont Business Plan clearly spells out Du Pont's intentions as of November 1971 to compete actively with the other sellers of refrigerant gas on the basis of price, service to customers and technical innovation. Pl. Exh. No. 1113, pp. 19-21. The [19] Business Plan also summarizes the kind of competi-

---

dustry. *E.g.*, Crawford, Tr. 1364. In fact, however, of the five major list price changes that occurred during the 1969-1972 period, Du Pont was the first company to implement only one—in March 1971. Wright, Deposition 91, 98, 113-116; O'Donnell, Deposition 44-45; Napoli, Deposition 148. In addition, both Mr. Wright and Mr. O'Donnell testified that it was Du Pont's policy not to offer to sell to individual customers at prices below list unless Du Pont was meeting a competitive offer. Wright, Deposition 52-53; O'Donnell, Deposition 29-30. Finally, the evidence was undisputed that Du Pont could not charge a higher price for its refrigerant gas than its competitors without losing sales and, consequently, market share. Pl. Exh. No. 1113, p. 21; Hibdon Direct, Tr. 24.

tion Du Pont faced in the replacement market for refrigerant gas from the other American manufacturers:

> "Allied * * * emphasizes special price deals coupled with intensive personalized entertainment. Union Carbide * * * and Pennwalt * * * focus on special price deals motivated by their need to fill expanded capacity. Racon also uses price deals in an attempt to move their mix to a high cylinder/bulk ratio. Kaiser uses incentive trips to gain business." *Id.* at 13.

If Du Pont had possessed monopoly power, as alleged by plaintiff, it would not have been concerned about price competition from other companies—and there would have been no reason for Du Pont to resolve to compete on the basis of price, service to customers or technical innovation.

The Du Pont Business Plan is not alone in providing a sense of the competition Du Pont faced during the 1969-1972 period. The Du Pont Monthly Report for December 1970 observed, for example, that "[t]he decline in sales to wholesalers [during 1970] was due to competitive deals which we were reluctant to meet until mid-year. These included extended terms, rebates, discounts, and LTL's at the truckload price." Pl. Exh. No. 1296, p. 2. The Monthly Report for January 1971 commented: "There is continuing deterioration of prices in the marketplace due to increased competitive rebates." Pl. Exh. No. 1297, p. 3. The Report for July 1971 contained a similar observation: "Price erosion continues in the wholesale market." Pl. Exh. No. 1303, p. 1. Finally, the Monthly Report for November 1971 indicated that the vigorous competitive activity, centering on price, that had been described in the earlier reports had not abated: "Competition is fierce. They have upgraded their personnel and they are continuing to offer selected and special deals." Pl. Exh. No. 1090, p. 2.

[20] Additional insight into the extent of competitive activity, and of Du Pont's lack of control over the market

price of refrigerants, during the period of plaintiff's existence also is provided by the competitive price authorization forms ("CPA's") that plaintiff chose to offer into evidence. The mere existence of those CPA's, which record price deals reported by wholesalers to have been offered by Du Pont's competitors and decisions by Du Pont to meet these offers to avoid losing business, is inconsistent with the notion that Du Pont possessed monopoly power over price. Moreover, even a cursory examination of the CPA's that are in evidence confirms that Du Pont faced intensive price competition from all of the other American manufacturers of refrigerants—and that Du Pont was well aware that it would lose sales in the event it refused to lower its prices to meet competitive offers. *E.g.*, Pl. Exh. Nos. 1117, 1119, 1120 and 1121 (price competition at Baker Brothers from Allied, Pennwalt and Union Carbide); Pl. Exh. No. 1154 (price competition at Harry Alter Company from Kaiser, Allied, Union Carbide and Pennwalt); Pl. No. 1163 (price competition at Refrigeration Supplies from Racon, Allied, Pennwalt and Kaiser); Pl. Exh. No. 1164 (price competition at Solar Supply from Union Carbide, Pennwalt and Allied); Pl. Exh. 1166 (price competition at Standard Brass from Union Carbide and Kaiser); Pl. Exh. Nos. 1179, 1180 and 1181 (price competition at Tersco from Allied and Union Carbide); Pl. Exh. Nos. 1182-1185, 1189, 1192 and 1194 (price competition at Waugh Brothers from Pennwalt, Racon, Allied and Union Carbide).

It defies reason to maintain, in the face of all this evidence, that Du Pont possessed monopoly power over the market price of replacement refrigerants—that it had **[21]** the power to price and sell refrigerant gas in the replacement market without regard to the activities of its competitors. The simple fact, which was clearly and undisputably evidenced at trial, is that Du Pont did not have monopoly power over the price of refrigerant gas.

It is equally clear that Du Pont lacked the power to exclude competitors or prospective competitors from the

non-automotive replacement market for refrigerant gas. Once the original refrigerant gas patents expired in 1949, any barriers to entry that remained did not prevent the other defendants in this case from beginning to produce and sell refrigerant gas. There was no evidence at trial that Du Pont attempted to prevent any of the defendants from entering the refrigerant gas business—or, even more importantly, any evidence that it would have had the power to do so had it made the effort. The fact that Allied Chemical, Union Carbide, Pennwalt, Kaiser and Racon were able successfully to enter the refrigerant gas business prior to the time plaintiff began to import refrigerant gas from Japan shows conclusively that entry was possible so long as the potential entrant was not subject to disabling operating problems and diseconomies. Indeed, the presence of these competitors—all of which, with the exception of Racon (which was only in fluorocarbons), were large multi-product companies (Hibdon Direct, Tr. 12)—is fatal to any claim that Du Pont had the power to exclude competitors from the non-automotive replacement market for refrigerant gas.

C. *There Is No Evidence of the Exercise by Du Pont of Monopoly Power*

A further defect in plaintiff's individual monopolization claim against Du Pont stems from the fact that the possession of monopoly power, of itself, does not violate [22] the antitrust laws. Before a monopolization claim can be sustained, there must be a showing that monopoly power was employed unfairly. *E.g., Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d at 791; *Telex Corp.* v. *International Business Machines Corp., supra,* 510 F.2d at 926-27. As in the *Pacific Engineering* case, the "essential unfair means" alleged here relates to what plaintiff has characterized as "predatory pricing."

According to plaintiff's president, Mr. Richard Carter, the lowering of list prices in March 1971 effectively "stopped" plaintiff's sales of refrigerant gas. Carter, Tr. 196. Mr. Carter also testified that it was not until June 1971 that the full force of that price decrease was felt in the marketplace—and that plaintiff did not order any refrigerant gas from Japan after that time because plaintiff was unable, because of the price decrease, to sell the refrigerant gas plaintiff already had in storage. Carter, Tr. 197-198. Although plaintiff apparently continued to sell small quantities of refrigerant gas until October 1972, Mr. R. D. McDonald testified that in August 1971 The United States National Bank in Galveston, which had loaned substantial operating capital to plaintiff, instructed plaintiff to begin an "orderly liquidation" of its operations. McDonald, Tr. 538, 597. As plaintiff's counsel explained the situation in his closing argument:

> "For six months they just went like a house afire. From January of '71 to June of '71, they did great. They did great.
>
> * * *
>
> "And then in June of '71, the handle was turned off, and it stopped. Didn't have any more customers.
>
> * * *
>
> "They were out, and they realized they were out, and the bank advised them to go through whatever they called it, an orderly liquidation or something of that nature.

[23] "They were through. They had been driven out." Crawford, Tr. 1386, 1388.

The question that must be considered, then, is whether—assuming *arguendo* that Du Pont had monopoly power—Du Pont's decision in March 1971 to reduce its list prices for refrigerant gas in the non-automotive replacement mar-

ket constituted an "unfair means" of competition. The evidence at trial permits but one answer: that is, that the March 1971 list price reduction represented entirely reasonable, and permissible, competitive behavior by Du Pont.

There was extensive testimony concerning the nature of and the reasons for the March 1971 price reduction. Although Du Pont announced to the trade that it was reducing its list prices by 13 percent, the reduction amounted in fact to only eight percent. The reason is that, in implementing the reduction, Du Pont eliminated the five percent prompt payment discount that it previously had been allowing. Wright, Deposition 98, 194-198; O'Donnell, Deposition 44-45. Moreover, at least 50 percent of Du Pont's customers already were purchasing at the reduced price because of price competition Du Pont had encountered at those accounts from the other defendants. Wright, Deposition 197; O'Donnell, Deposition 45. The Du Pont executives responsible for the price reduction understood that customers who already were purchasing at the reduced prices would react unfavorably to extension of the lower terms to other customers (*e.g.*, Pl. Exh. No. 1042), but they concluded that a lowering of Du Pont's list prices was nevertheless required by competitive conditions.

As explained by Mr. Wright and Mr. O'Donnell, the March 1971 price reduction represented an effort on Du Pont's part to stop the loss of sales and erosion of market position that had been occurring. As stated by Mr. Wright, Du Pont's Marketing Manager for Refrigerants:

[24] "[W]hen I joined the [Freon Products] group in the fall of '70, it was quite evident that we were not competitive at a number of wholesalers, and as such were being penalized in penetration; a as long as that volume was not great in penalty, and the prices maintained themselves, we still were making good money, but as soon as the volume began to eat away to the point that our plants were running at such a

rate that all of the distributives that I mentioned were beginning to be constant on a smaller group of pounds, then the profits began to tumble." Wright, Deposition 188.

Mr. Wright and Mr. O'Donnell also testified that although they were aware of Daiflon's existence as of March 1971, that fact did not play any role in the decision to reduce Du Pont's list prices. Wright, Deposition 198-199; O'Donnell, Deposition 92. That is hardly surprising since not one of the CPA's that were received in evidence mentioned Daiflon as the source of a competitive offer to one of Du Pont's customers; and, as noted previously, Daiflon sold only 2.4 million pounds of refrigerant gas during the four years of its existence, which was less than ¼ of one percent of the total sales of refrigerant gas in the United States during that period. Discussion at p. 3 *supra*. The competition that led Du Pont to reduce its list prices in March 1971 was from the other defendants, not from Daiflon.

Furthermore, there is no evidence whatsoever, that as a result of the March 1971 price reduction, Du Pont was selling its refrigerant gas below either its fully allocated cost or its marginal or incremental costs. Neither is there any basis for finding that Du Pont was making other than a reasonable profit on the sales it made pursuant to the March 1971 list price reduction; indeed, the undisputed evidence was that Du Pont would have sacrificed short-term profits had it not reduced its list prices at that time. In sum, in light of the competitive conditions that existed as of March 1971, the decision by Du Pont to reduce its list prices constituted "rational, competitive behavior." *Pacific* [25] *Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d at 797.[5]

---

[5] The testimony of Mr. Wright indicating that Du Pont made some below-cost sales of refrigerant gas in mid-1972 is of no assistance to plaintiff. Although plaintiff's counsel failed to mention the fact in his arguments to the jury, Mr. Wright testified that,

The fact that the lowering of Du Pont's list prices may have made life more difficult for Daiflon does not make Du Pont's actions unlawful.[6] As the court of **[26]** appeals

---

although below fully-allocated cost, each of those sales was above Du Pont's marginal and average variable costs. Wright, Deposition 193-194. Mr. Wright testified additionally that the sales below fully-allocated cost were made to meet competition from the other defendants, not Daiflon, following the list price reduction first made by Allied Chemical in March 1972. *Id.* at 114. Finally, any such sales are, in any event, irrelevant to this case since, as already noted, plaintiff's position at trial was that it was driven out of business by the events of mid-1971, and that the "orderly liquidation" of plaintiff's operations that was ordered at that time by The United States National Bank in Galveston was virtually complete by mid-1972. *E.g.*, Crawford, Tr. 1386, 1388.

[6] This would be true even if there were evidence, which there is not, that this was Du Pont's intent. Under the law in this Circuit, as elsewhere, sales made by a company above its fully-allocated costs (at the very least) are conclusively presumed to be lawful. *E.g.*, Pacific Engineering & Production Co. v. Kerr-McGee Corp., *supra*, 551 F.2d at 795-97.

Thus, the statements of plaintiff's counsel during closing arguments focusing on Pl. Exh. No. 1066, a trade report written by a Du Pont salesman in Birmingham, Alabama, were wholly beside the point. The portion of that exhibit relied upon by counsel reads as follows: "Mr. Gennett is causing quite a stir in the Birmingham area. He is passing on the 13% discount that we offered in order to combat the Japanese refrigerant." Since there was no evidence that any sales made by Du Pont pursuant to the March 1971 list price reduction were below Du Pont's fully-allocated costs, such sales would not have been unlawful (or have had any relevance to plaintiff's monopolization or attempted monopolization charges), even if made "to combat the Japanese refrigerant." Moreover, there is no evidence that the writer of the trade report, a salesman in the field, had any knowledge concerning Du Pont's intent in reducing its list prices in March 1971. Finally, we submit that the quoted portion of the trade report cannot sensibly be construed as plaintiff's counsel has suggested. As Professor James Hibdon stated, when shown the report by plaintiff's counsel: "Du Pont apparently had given a 13% discount which Mr. Gennett received, and what he is doing is passing on that discount in order that he can meet the Japanese competitor." Hibdon Direct, Tr. 29-30.

for this Circuit pointed out in *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960): "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." Because plaintiff's costs were admittedly higher than those of the defendants, including Du Pont (McDonald, Tr. 586-587), plaintiff was uniquely vulnerable to competition. But, unfortunately for plaintiff, neither the antitrust laws "nor any social value compels the sheltering of an individual competitor, at the expense of the public interest, from the competitive process." *International Air Indus., Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 721 (5th Cir.), *cert. denied*, 424 U.S. 943 (1975), quoted approvingly in *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, *supra*, 551 F.2d at 799; *accord, e.g., Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1358-59 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, *supra*, 269 F.2d at 956.

Contrary to plaintiff's contentions at trial, nothing in Section 2 of the Sherman Act prohibits "price changes which are within a 'reasonable' range, up or down." *Telex Corp.* v. *International Business Machines Corp.*, *supra*, 510 F.2d at 927. That was all that was shown here: a reasonable, and moderate, list price reduction by Du Pont in response to competitive conditions. As the court of appeals concluded recently in *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, *supra*, 551 F.2d at 795 quoting from *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass.), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961): "'[I]ntending the natural consequences of acts which are in all respects lawful, does not constitute the 'exclusionary intent' **[27]** that is a prerequisite for finding a violation of section 2 [of the Sherman Act].'"

D. *Plaintiff Also Failed To Produce Substantial Evidence of Attempted Monopolization by Du Pont*

The fundamental defect of plaintiff's attempted monopolization claim against Du Pont is that it confuses competition, which the law encourages, with the kind of predatory conduct that is of concern under the antitrust laws. From the closing argument of plaintiff's counsel, one would suppose that it is unlawful to engage in price competition, to try to prevent continued inroads by expanding competitors, or to try to meet competition in the marketplace. Indeed, plaintiff's position at trial appeared to be that it was entitled to a "reasonable" share of the sales of refrigerant gas in the non-automotive replacement market—despite its admittedly high costs and operating problems.

Of course, that is not the law. The courts have been quite specific concerning the components of an unlawful attempt to monopolize. As noted above (discussion p. 5, *supra*), the essential elements of an attempted monopolization claim are proof of a specific intent to monopolize accompanied by a dangerous probability that monopoly power will be achieved. A showing of the requisite specific intent requires, in turn, proof that the defendant engaged in predatory conduct designed to control prices or destroy competition. *E.g., Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra*, 551 F.2d at 797. The evidence at trial precludes a finding in plaintiff's favor on *any* of these elements.

At the outset, it is important to emphasize that the present record contains undisputed evidence of Du Pont's marketing objectives and goals as of 1971 when, according to plaintiff, Du Pont reduced its list prices in an effort to **[28]** monopolize the non-automotive replacement market for refrigerant gas. That evidence, reflected in Du Pont's Business Plan, was that Du Pont intended by 1976 merely to attempt to maintain against competitive inroads the 40 percent market share it had in 1971. Pl. Exh. No. 1113,

p. 28. A company with this intent can hardly be said to be attempting to monopolize the market.

Plaintiff simply ignored this evidence. It originally chose instead to base its predatory pricing allegation against Du Pont on the testimony of Mr. Scott Campbell, an accountant who had been retained by plaintiff. The choice proved to be disastrous. This effort to prove predatory pricing was a complete failure. Mr. Campbell testified on direct examination that he had been able to document sales below cost by Du Pont at two accounts—Tersco, Inc., and Waugh Brothers, Inc. But on cross-examination, Mr. Campbell was forced to admit that the charts on which his testimony was based were "inaccurate and misleading" in that (1) he had inaccurately plotted Du Pont's cost information, so that his charts purported to show sales below total cost when in fact Du Pont's offering prices always were above its total cost, and (2) he did not know whether Du Pont actually had made any sales at the price levels shown on the charts. Campbell, Tr. 886, 908-909. It is to put the matter charitably to say that plaintiff's attempted monopolization claim died with the testimony of Mr. Campbell.[7]

Plaintiff then retreated to the March 1971 list price reduction that Du Pont had implemented as showing Du Pont's specific intent to monopolize. As previously demonstrated, however, that reduction represented reasonable [29] competitive behavior by Du Pont: just as there was no evidence that that price reduction constituted an "unfair means" of competition, there is no basis for concluding that the reduction amounted to "predatory conduct" designed to control prices or destroy competition.

---

[7] The fact that plaintiff failed even to show that it was competing with Du Pont for the business of Tersco or Waugh Brothers, or for the business of customers of those companies, only underscores the absurdity of the Campbell presentation.

Under settled law, "[p]ricing is predatory *only* where the firm foregoes short term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits." *Janich Bros., Inc.* v. *American Distilling Co., supra,* 570 F.2d at 856 (emphasis added); *accord, e.g., Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d at 797. But what plaintiff has persistently overlooked is that not every price reduction signals that the firm is foregoing short-term profits for longer-term gain. The term "predatory pricing" does not encompass prices set above a firm's total cost—and it is exceedingly doubtful, under recent cases in this Circuit, whether prices set above a firm's marginal or average variable cost could ever be presumed predatory. *E.g., Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d at 795-97; *accord, e.g., William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.,* 1978-2 Trade Cas. ¶ 62,345 (9th Cir. 1978); *Murphy Tugboat Co.* v. *Crowley,* 1978-2 Trade Cas. ¶ 62,172 (N.D. Calif.); *Janich Bros., Inc.* v. *American Distilling Co., supra,* 570 F.2d at 858; *Hanson* v. *Shell Oil Co., supra,* 541 F.2d at 1358-59.

Thus, even if the inaccurate and misleading nature of Mr. Campbell's testimony had not been revealed on cross-examination, that testimony would have had little, if any, relevance to plaintiff's attempted monopolization charge because Mr. Campbell did not even purport to show any sales by Du Pont below its marginal or average variable cost. Campbell, Tr. 869. And, as noted, there was no evidence whatosever that any sales by Du Pont pursuant to the March **[30]** 1971 list price reduction were below total cost—much less marginal or average variable cost. Discussion at pp. 23-24, *supra.* There was, in short, a complete failure of proof at trial that Du Pont ever engaged in predatory conduct of the type required to show a specific intent to monopolize.

There is yet a further defect in plaintiff's attempted monopolization case against Du Pont. At no time following

plaintiff's entry into the refrigerant gas industry was there a "dangerous probability"—or, indeed, any probability at all—that Du Pont somehow would achieve a monopoly in the non-automotive replacement market for refrigerant gas. During the 20-year period following the expiration of the original fluorocarbon patents in 1949, Du Pont's share of the non-automotive refrigerant gas replacement market dropped continuously—from 100 percent in 1949 to approximately 40 percent during the 1969-1972 period. Hibdon Direct, Tr. 11-12. The cases are uniform in holding that where a company's market share is not close to the level recognized as the threshold of monopoly power (as Du Pont's was not), and it faces competition from strong and vigorous competitors, no "dangerous probability" exists that a monopoly will be achieved. *E.g., United States* v. *Empire Gas Corp., supra,* 537 F.2d at 296 (attempted monopolization claim rejected where defendant's market share only 50 percent and it had powerful rivals); *Diamond International Corp.* v. *Walterhoefer,* 289 F. Supp. 550 (D. Md. 1968) (51.1 percent of egg carton market was insufficient to show a dangerous probability of monopoly where defendant "vulnerable to competition").

In sum, plaintiff failed at trial to produce substantial evidence of either monopolization or attempted monopolization by Du Pont. In fact, the evidence at trial was such as to preclude, as a matter of law, findings **[31]** against Du Pont on those claims. That portion of the jury's verdict, as a consequence, cannot be sustained.

III. Plaintiff Failed To Produce Substantial Evidence of Conspiracy

The law in this Circuit, as elsewhere, is that a conspiracy claim under the Sherman Act cannot be sustained without proof of an agreement—that is, a "meeting of the minds" or "conscious commitment" among the alleged conspirators—to engage in conduct that violates the antitrust laws. *E.g., Webb* v. *Utah Tour Brokers Ass'n,* 568 F.2d

670, 674-75 (10th Cir. 1977); *Hanson* v. *Shell Oil Co., supra,* 541 F.2d at 1359; *Cackling Acres, Inc.* v. *Olson Farms, Inc.,* 541 F.2d 242, 244-45 (10th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977). Although a conspiracy can be established by circumstantial evidence (*see, e.g., Theatre Enterprises, Inc.* v. *Paramount Film Dist. Corp.,* 346 U.S. 537, 540-41 (1954)), the burden always remains with plaintiff to prove by a fair preponderance of the evidence both (1) that a conspiracy existed and (2) that, as a result of the conspiracy, plaintiff suffered measurable damages. Whether these elements are sought to be proved by direct or circumstantial evidence, the "essential requirement is that mere speculation be not allowed to do duty for probative facts * * *." *Galloway* v. *United States, supra,* 319 U.S. at 395.

The conspiracy charged in the present case is a conspiracy to reduce the price of refrigerant gas in the non-automotive replacement market in order to drive plaintiff out of business. Plaintiff admitted prior to trial, in answering interrogatories served by the defendants, that it had "no knowledge of any specific meeting, conversation or communication by which the claimed combination or conspiracy was formed or effectuated." Ans. to Int. 11(b). True to its word, plaintiff introduced no direct evidence at trial of any conspiracy directed toward it—or, indeed, of any **[32]** conspiracy involving the defendants having some different purpose. In short, the success of plaintiff's conspiracy claim was dependent throughout on plaintiff's adducing persuasive circumstantial evidence of the alleged conspiracy.

It is difficult to imagine a more complete failure of proof than occurred here. Although plaintiff had almost unlimited access to the files of all of the defendants for several years, and took numerous depositions, the present record contains no credible evidence—circumstantial or otherwise—of the conspiracy alleged by plaintiff. As plain-

tiff's case developed at trial, it became clear that the centerpiece of its conspiracy claim, as of its monopolization claims, was the list price reduction first implemented by Du Pont in March 1971. But the evidence showed conclusively that that price reduction was the product of vigorous competition rather than of any conspiracy.

Because of this failure of proof, plaintiff's counsel was forced to resort during closing arguments to unwarranted speculation, mischaracterization of the evidence and an appeal to the jurors' emotions and possible prejudices. Although these tactics apparently had their intended effect on the jury, they cannot be allowed "to do duty for probative facts." *Galloway* v. *United States, supra,* 319 U.S. at 395. The absence of substantial, credible evidence of a conspiracy means that the conspiracy verdict cannot be sustained.

A. *The List Price Reduction First Implemented by Du Pont in March 1971 Was the Product of Competition Rather Than of Conspiracy*

The reasons for, and some of the circumstances surrounding, the decision by Du Pont in March 1971 to reduce its list prices for refrigerant gas have already been discussed. See discussion at pp. 23-25 *supra*. As we showed [33] there, although Du Pont billed the reduction as one of 13 percent, it amounted in practical effect to an eight percent reduction for some customers and to no reduction at all for the approximately 50 percent of Du Pont's customers who previously had been buying refrigerant gas from Du Pont at the reduced price; the purpose of the list price reduction, according to the Du Pont executives who were responsible for it, was to stop the loss of sales and erosion of Du Pont's market share stemming from Du Pont's failure to remain competitive; finally, there was testimony establishing that the existence of Daiflon played no role in Du Pont's decision to reduce its list prices.

But even if it could be said that Du Pont's March 1971 list price reduction was somehow unreasonable in terms of its magnitude, or that the purpose of the reduction was to injure Daiflon, those conclusions would not help plaintiff's conspiracy claim. The question, so far as plaintiff's conspiracy allegation is concerned, is whether the reduction was arrived at and implemented pursuant to a conspiracy —an agreement—involving two or more of the defendants. In fact, evidence of the absence of a conspiracy is overwhelming.

Perhaps understandably, plaintiff's counsel did not refer during the closing arguments to the unrefuted evidence concerning the manner in which Du Pont chose to announce its March 1971 list price reduction to the trade. Mr. Wright explained that aspect of the March 1971 reduction as follows:

"Q. Did Du Pont initiate that price reduction?

"A. We did, indeed.

"Q. To what extent did you have any discussion with any competitor prior to the initiation of that price reduction?

[34] "A. None whatsoever. In fact, we didn't put it in writing, even, to make sure that we were able to get it to all the customers verbally at the appointed hour on March 15th, we hoped. We had very extensive meetings across the country, which we had all travelled very extensively for, to prepare everybody for the details of this move, this particular move, and the reasons for it.

"Q. To your knowledge, did anyone in DuPont discuss this price reduction with any of your competitors?

"A. To our knowledge, it was a complete surprise to all of our competition, which was precisely the move we wanted to make."

Wright, Deposition 195; *see also id.* at 187-188, 194-199; O'Donnell, Deposition 91.

Plaintiff made no effort at trial to explain why Du Pont made such elaborate efforts to communicate privately to individual customers its decision to reduce its list prices. Obviously, if Du Pont had arrived at the decision pursuant to a conspiracy with the other defendants—and the other defendants, as a consequence, already were aware of the decision—the secrecy would have served no purpose. The manner in which Du Pont chose to inform its customers of the reduction is thus inconsistent with any notion of a conspiracy.

Moreover, although plaintiff's counsel asserted repeatedly at trial that the other defendants moved "simultaneously" to meet Du Pont's list price reduction (*e.g.*, Hibdon Cross-Examination, Tr. 4), the evidence is squarely to the contrary. Union Carbide, for example, did not decide to meet Du Pont's list price reduction until late May 1971 —some 60 days after the effective date of Du Pont's reduction. Pl. Exh. No. 4589, p. 7. It was not until May 19, 1971, that Allied Chemical adjusted its list prices downward to meet the Du Pont competition (Pl. Exh. No. 514), although **[35]** Allied had begun to meet the reduction at individual accounts by the end of March. Pl. Exh. No. 1042. Kaiser did not alter its list prices until October 1971, making the reductions effective as of September 1, 1971. Sorensen, Deposition 93-94; Pl. Exh. No. 3719. As for Pennwalt, the only evidence of the timing of Pennwalt's decision to reduce its prices was a Du Pont trade report, written by a salesman after a survey of customers in the field, reporting to Du Pont management as of March 30, 1971, that he had heard "[n]o word on Pennwalt as to their reaction to our discount arrangement."[8] Pl. Exh. No.

---

[8] To remedy this glaring lack of evidence, plaintiff's counsel grossly and inexcusably misread this document in his closing to the jury as "No word yet *from* Pennwalt." Crawford Tr. 1482, Line 10 (emphasis supplied).

1042. Finally, Racon reacted quickly to Du Pont's surprise across-the-board price decrease of March 15, 1971. Racon's management, while admittedly still somewhat confused about the extent of "the recent price moves", decided even before the situation was "completely clarified" to move to meet this price competition "retroactive to 3-15-71" and formally instructed its sales force by memorandum dated April 1, 1971, to "move promptly to meet this competition (where offered). . . . Do not lose any business!" Pl. Exh. No. 5024.

There is absolutely no evidence that any defendant company knew either that the price decrease was coming or Du Pont's reason for deciding to reduce prices.

The evidence thus belies plaintiff's assertions that the defendants reduced their list prices "simultaneously" on March 15, 1971. As word of the Du Pont list price reduction spread throughout the industry, the other defendants decided individually—over a period of almost six months —to meet the Du Pont reduction. There also was substantial evidence indicating why the other defendants had little choice but to reduce their list prices in response to Du Pont's actions.

[36] One of plaintiff's expert witnesses, Dr. Benton Gup, testified, for example, that as an economist, he would expect the price of refrigerant gas to "be the same throughout the industry." Gup, Tr. 1075. Following that statement, the following exchange occurred:

> "Q. Well, is this charging of identical prices, that you presuppose, a perfectly normal competitive reaction?
>
> "A. For homogeneous products?
>
> "Q. Yes.
>
> "A. Yes.

"Q. Why is that?

"A. It's a natural market mechanism among competitors."

Gup, Tr. 1076. Dr. Gup then was asked what would happen if one of the domestic manufacturers decided to try to sell its refrigerant gas at a price above the price being charged by its competitors. Dr. Gup responded: "He [would] lose market share." Gup, Tr. 1076-1077. Finally, Dr. Guy agreed that, if one manufacturer lowered its price, the other manufacturers would be forced to lower their prices "pretty quick" as well. Gup, Tr. 1077. *Accord, e.g.*, Jadlow, Tr. 1217; Hibdon Direct, Tr. 24-25; Carter, Tr. 113.

The validity of the unanimous expert opinion on this matter, and of its applicability to the refrigerant gas industry, is dramatically illustrated by an internal Union Carbide document entitled "The Fluorcarbon Market—Competitive Situation and UCC Pricing Strategy 1967 Through 1971." Pl. Exh. No. 4589. As already noted, Union Carbide did not respond to Du Pont's March 1971 list price reduction until late May 1971. Pl. Exh. No. 4589 reveals that this two-month delay had a devastating effect on Union Carbide's sales:

> "Competitive price action in the Replacement Refrigerants (cylinders) rapidly increased in intensity in the [37] early part of 1971 as the refrigeration season got underway. The UCC position through the first part of the season was to reject all competitive price offers in an effort to maintain the Pennwalt January, 1971 price increase. We were forced to retreat from this position late in May, 1971 as it became very obvious that we were losing position at a catastrophic rate. As a result, UCC lost market share in the Replacement Market by the end of 1971 (about 2%)."

The sales losses that Union Carbide suffered because of its failure to respond quickly to Du Pont's March 1971 list price reduction amounted to some 5,000,000 pounds of refrigerant gas in 1971 alone. Napoli, Deposition 66. This is two and ½ million pounds more than Daiflon sold during its entire four-year existence. Def. Exh. No. 91. To suggest that Union Carbide delayed responding to Du Pont's list price reduction until the effects on Union Carbide's sales were "catastrophic," but that Du Pont's actions nonetheless were pursuant to a conspiracy with Union Carbide and the other defendants, borders on the ludicrous. *See also* Sorensen, Deposition 91-94.

If plaintiff had made an analysis of the refrigerant gas industry before deciding to begin importing refrigerant gas from Japan, rather than simply assuming that the industry had been and would continue to be a "high profit" business for everyone involved (Carter, Tr. 104),[9] **[38]** it

---

[9] During the final portion of his closing argument, plaintiff's counsel referred to Pl. Exh. No. 1311 as showing

> "[o]bviously high profits. There is no—they don't refute it. It's $3.19 profit they were making on a product they were selling for $3.96. Why didn't they say something about that? It shows the high profits. * * * " Crawford, Tr. 44.

What plaintiff's counsel failed to tell the jury was that (1) the product on which Du Pont had realized a profit of $3.19 per pound was F-13, a product not involved in this case (Daiflon sold only R-11, R-12 and R-22); (2) Du Pont had a patent covering F-13, so that it could not be manufactured by any other company; and (3) the purchaser in the transaction referred to by counsel was the Linde Division of Union Carbide. Thus, counsel's references to Pl. Exh. No. 1311 were both misleading and prejudicial—and the portion of the exhibit counsel relied upon is itself irrelevant to this case.

The only evidence at trial of the profits realized by the defendants on R-11, R-12 and R-22 (the products at issue here) in the non-automotive replacement market was the testimony of Professor Hibdon. Professor Hibdon testified that there was no evidence of the defendants making monopoly profits and, in fact, there was evidence to the contrary. Hibdon, Re-Direct Tr. 43.

would have discovered that there was nothing unique about the list price reduction made by the defendants at various times in early 1971. As demonstrated by the testimony of Professor James Hibdon, actual transaction prices for fluorocarbon products, including refrigerants, had been declining precipitously during the entire ten-year period *preceding* plaintiff's entry in the business. Hibdon Direct, Tr. 20. The primary reason for this price deterioration was, according to Professor Hibdon, the substantial overcapacity that existed. Hibdon Direct, Tr. 20-21. Accord *e.g.*, Wright Deposition 188. Indeed, the price declines were most severe during the 1960s in refrigerant grade 22, which is the grade of refrigerant gas on which plaintiff chose to concentrate its sales efforts. Hibdon Direct, Tr. 22.

In sum, there is no evidence that the list price reduction about which plaintiff has complained was other than a normal, and entirely lawful, competitive reaction to market realities. Plaintiff's failure to produce substantial evidence to the contrary means that the conspiracy verdict in this case cannot stand. As noted, plaintiff's position at trial was that the effect of the defendants reducing their list prices in early 1971 was to "stop" plaintiff's sales. Carter, Tr. 196. According to plaintiff's counsel, by June 1971 "[t]hey were out, and they realized they were out, and the bank advised them to go through whatever they called it, an orderly liquidation or something of that nature." Crawford, Tr. 1388. Even if **[39]** these assertions are accepted at face value, and the admittedly "disastrous" impact on plaintiff's business of the import surcharge that was imposed in August 1971 is ignored (Def. Exh. No. 9), there simply is no basis for finding that plaintiff's failure was the result of conspiratorial conduct by the defendants.

B. There Was No Other Credible Evidence At Trial of the Alleged Conspiracy

The other pieces of evidence that plaintiff relied upon do not, either singly or in combination, provide substan-

tial evidence to support plaintiff's conspiracy claim. Indeed, none of this evidence warrants more than summary analysis.

1. *The opportunity to conspire.* Plaintiff attempted to make much at trial of the fact that representatives of various of the defendants sometimes attended trade association meetings. Attendance at those meetings, according to plaintiff, means that the defendants had the "opportunity" to conspire.[10] Crawford, Tr. 1469-1482.

But there was no evidence that Daiflon, or Japanese refrigerants, was discussed at any trade association meeting attended by representatives of one of more of the defendants. *See, e.g.,* Napoli, Deposition 220-221; Ward, Deposition 107-108; Wright, Deposition 205; Regan, Deposition 84-86. Indeed, there is no reason to believe that attendance at trade association meetings gave the defendants any more "opportunity" to conspire than did the fact that executives of the defendants, responsible for the sale of refrigerant gas, each presumably had access to telephones.

[40] 2. *Market intelligence activities.* A substantial amount of trial time was consumed by plaintiff's effort to prove that each of the defendants attempted to gather information about Daiflon, both to determine whether Daiflon's Japanese supplier was violating federal anti-dumping laws and to obtain a sense of the nature and size of Daiflon's operations. There is no dispute that some of these activities occurred, even if

---

[10] Mr. McDonald acknowledged that representatives of A. Y. McDonald Company attended trade association meetings. McDonald, Tr. 570. Mr. Adams acknowledged that he had attended trade association meetings in the past. Adams, Tr. 721.

they were not always successful.[11] But neither is there any basis for suggesting that such activities are other than a normal, and entirely appropriate, aspect of the competitive process.

Defendants had a constitutional right to investigate the possibility of a dumping violation by Daiflon's Japanese supplier, even though the exercise of that right might have been intended to harm Daiflon. 19 U.S.C. § 160 *et seq.; Eastern R. R. Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-45 (1961). Similarly, true competition could not exist if individual companies were required to close their eyes to the activities of their competitors, or risk violating the federal antitrust laws. And there is no evidence at all tending to show that the defendants shared among themselves information as to Daiflon's costs, prices or methods of distribution. Such market intelligence activities are indicative of the vigorous competition **[41]** that existed in the refrigerant gas industry during the period encompassed by this case.

3. *Distribution patterns.* A significant portion of the exhibits that plaintiff offered at trial were letters from certain of the defendants declining to sell refrigerant gas directly to the individuals or companies involved. Plaintiff's counsel repeatedly used the phrase "Dear John letters" to refer to these exhibits, suggesting that the exhibits somehow revealed improper conduct by the defendants. *E.g.*, Crawford, Tr. 1449-1452.

---

[11] An illustration of the deficiencies of defendants' market intelligence activities is Pl. Exh. No. 4552. As of April 28, 1971—fully one month after defendants are alleged to have conspired to reduce the price of refrigerant gas to drive Daiflon out of business—at least two of the alleged co-conspirators were unaware of Daiflon's source of supply. Indeed there is a suggestion in the exhibit that one of the other domestic manufacturers (a purported co-conspirator here) was supplying refrigerant gas to Daiflon.

In fact, each of the defendants is entitled by law to determine with whom it wishes to do business. There was absolutely no evidence that the defendants communicated among themselves concerning the selection of wholesale outlets for their refrigerant products.[12] [42] Nevertheless, plaintiff's counsel persisted during his examination of witnesses, as well as in closing arguments, in referring to "their [—the defendants'—] approved list," implying that there was some common list approved by defendants pursuant to agreement among them. *E.g.*, Crawford Rebuttal, Tr. 28. Objections to this tactic did not deter counsel from continuing this course of purposefully misleading the jury. *E.g.*, Hibdon Direct, Tr. 8-13. Although the jury may have been unable to appreciate that the "Dear John

---

[12] It is instructive in this regard to recall the deposition testimony of Mr. Harold Gresham, which was often referred to by plaintiff's counsel during closing arguments as showing that the defendants had "allocated" the refrigerant gas replacement market among themselves. *E.g.*, Crawford, Tr. 1498-1503. Although Mr. Gresham used the word "allocation" in his deposition (Gresham, Deposition 16), it is apparent that Mr. Gresham's definition of that word bore no relation to the definition supplied by plaintiff's counsel or to the kind of market allocation that is of concern under the antitrust laws. When asked to define what he meant in using the word "allocation," Mr. Gresham responded:

> "Well, there's [a] certain percent of the market that Kaiser was getting, and it was my impression from management that we would try to maintain that percent of the market and not really go all out with any particular account and try to change it. * * * It was my understanding, now, that with Kaiser we expected, or we wanted a much larger percent of the market, and that if we went after a much larger percent of that, that we would suffer pricewise * * *." Gresham, Deposition 179.

In addition, Mr. Gresham stated specifically that he had no reason to believe that any of the decisions made by his superiors at Kaiser were based on agreements, understandings or discussions with any of the other manufacturers of refrigerant gas. Gresham, Deposition 183.

letters" do not constitute evidence of a conspiracy, the fact that plaintiff felt compelled to emphasize the letters is indicative of the weakness of plaintiff's case.

Furthermore, although plaintiff attempted at trial to minimize the significance of the import surcharge and the subsequent devaluation by suggesting that "it ran out of customers, not gas" (Crawford, Tr. 546-547; McDonald, Tr. 547, 609) it made no effort to explain why it ran out of customers or on what basis defendants could be held responsible for that development. Plaintiff made no effort to establish, for example, that "it ran out of customers" in June 1971 because the defendants began, as part of the alleged conspiracy, to sell refrigerant gas directly to customers of Daiflon to whom they previously had refused to sell.

4. *Late 1972 price increases.* Plaintiff's counsel also argued that the list price increases that occurred in October 1972, at about the same time that Daiflon made its last sale of refrigerant gas, indicate that the defendants waited until Daiflon had been excluded from the business before permitting prices to increase. Crawford, Tr. 17-19. There is no credible evidence to support this theory.

[43] Mr. Don Napoli of Union Carbide, which initiated the October 1972 price increase, testified that the Union Carbide business team had begun to discuss in late 1971 and early 1972 the possibility of raising Carbide's list prices in October 1972, after the busiest portion of the air conditioning season had ended. Napoli, Deposition 53-54. The reason for Union Carbide's decision to increase its list prices at that time, as explained by Mr. Napoli, was "to attempt *on our own* * * * to cover increasing costs consistent with Federal Regulations." (Emphasis supplied.) Napoli, Deposition 203.

Mr. Napoli also testified that, because the other defendants decided to continue to sell their refrigerant gas at prices below Carbide's increased list prices, Carbide was soon forced to rescind the increase in order to avoid losing sales:

> "Q. Why did you find it necessary to change your price schedule that you had just issued in October?
>
> "A. Because after competition announced their price decreases, and other competitors did likewise, we found ourselves in a position where we would lose all our business as a result of feedback we got from our customers, saying they would no longer buy from us." Napoli, Deposition 196.

In short, there was no evidence that the list price increases announced in the Fall of 1972 were conspiratorial. And there is no evidence that any defendant's decision to increase list prices at that time was motivated or influenced by Daiflon's exit from the market. Given this complete failure of proof with regard to the 1972 price increases, the fact of the increases does not permit any inference that the 1971 list price reduction, about which plaintiff complains, was arrived at pursuant to a conspiracy or that it was directed at plaintiff.

[44] In sum, this case has been pending in the federal courts, in one form or another, for over seven years. Plaintiff was given every opportunity during that time to search through each of the defendants' files, to take deposition testimony from employees of the defendants, and to discover any pertinent evidence that might be possessed by non-party witnesses. Despite this opportunity plaintiff has failed miserably to produce credible evidence of any conspiracy. It has fared no better with its belated monop-

olization and attempted monopolization claims against Du Pont. The only result, consistent with the legal principles governing plaintiff's substantive claims, would be to enter judgment n.o.v. for the defendants.

IV. All Defendants Are Entitled To Judgment Because of Plaintiff's Failure To Prove Impact and Damages

Going into the trial, Daiflon had taken the position that its only damages are the fair market value of its allegedly destroyed business, as calculated by Dr. Benton Gup. This damage claim was set out in plaintiff's Supplemental Response to Defendants' Third Set of Interrogatories, filed in July 1977.[13] Dr. Gup's damage computation was asserted to be the sole basis for Daiflon's damages claim by Mr. Carter during his deposition in November 1977 (page 13), and this deposition testimony was reaffirmed by Mr. Carter at trial. Carter, Tr. 275.

As we will show, however, for a number of reasons, Dr. Gup's damage computations—the exclusive basis of Daiflon's claim for damages—are legally insufficient to permit any damage award.

[45]

A. *Gup Was Not Competent To Introduce the Conclusions of Another Expert (Iskander)*

On the basis of his limited expertise, all that Dr. Gup could put before the jury were his ranges of various assumed values (such as "minimum," "most likely" and "maximum" market share, etc.), which are shown in the chart entitled "Financial Model Used to Determine Value of Daiflon, Inc. Def. Exh. No. 79. To get from this collection of

---

[13] The method and numbers used in that interrogatory answer are those that went into Dr. Gup's trial testimony and into the two exhibits (Def. Exh. Nos. 79 and 80) that he used to illustrate his testimony.

numbers to the claimed most likely fair market value of Daiflon of $2.96 million, Dr. Gup employed a computer programmer, Mr. Fadel Iskander, who wrote and ran the program that resulted in the $2.96 million figure that Dr. Gup then proffered as his own. However, Dr. Gup admitted that he had simply relied on Iskander, that he (Gup) had not checked the program, and that he (Gup) was in fact not even competent to read the program. Gup, Tr. 962, 966, 1021, 1028.

A report prepared by one expert (Iskander) cannot just be adopted and proffered by a different expert who is on the stand (Gup). *6816.5 Acres of Land* v. *United States*, 411 F.2d 834, 839-40 (10th Cir. 1969). This is particularly so when the absent expert's report is prepared for the specific purpose of the litigation. See also the precisely in-point discussion of Rule 703 of the Federal Rules of Evidence in *Carlin* v. *Zimmer Manufacturing Co.*, —— F.Supp. —— (E.D. Pa. 1978), a copy of which is attached for the Court's convenience.

B. *Gup's Damage Theory Improperly Assumed a Daiflon Sales Price Prevailing During Defendants' Alleged Conspiracy To Raise Prices*

A key assumption made by Dr. Gup in valuing Daiflon was that Daiflon would most likely be getting a price of 60¢/lb. in the marketplace for its products. If that assumption cannot stand, Dr. Gup's assumption as to net income [46] (putting to one side the separate infirmities which that net income figure has) of course cannot stand either.

It is absolutely clear that no claim for damages can validly be based on this 60¢/lb. price. This is because, in assuming that in the base year (1972) Daiflon would be getting the same price as the defendants (this being a homogeneous product), Dr. Gup also assumed that this 60¢/lb. price was then being charged by the defendants pursuant to a conspiracy to keep the price *as high* as 60¢/

lb. Gup, Tr. 1069-1070. A theory of damages that measures what plaintiff would have done by reference to the beneficial, protective umbrella of defendants' alleged conspiracy is legally impermissible. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 376-78 (1927). *See also Murphy Tugboat Co.* v. *Crowley, supra*, 1978-2 Trade Cases ¶ 62,172 (N.D. Calif.).

C. Gup's Damage Theory Also Falls Because He Was Completely Wrong About One of The Most Important Facts—The Market Share That Daiflon Actually Had Attained—Underlying His Theory

Dr. Gup's damage theory also is invalid because he was totally wrong about what he acknowledged was one of the most important facts underlying his assumption that Daiflon would most likely have had 2 percent of the market. He acknowledged that market share is a "critical" number in valuing a company. Gup, Tr. 1089. And he admitted that "one of the most important facts" in coming up with the 2 percent "most likely" market share assumption was his belief that Daiflon actually had attained a 2 percent share of the market. Dr. Gup stated that he had seen the 2 percent figure in some balance sheet. Gup, Tr. 1089-1094.

But Dr. Gup was absolutely and incontrovertibly wrong about the market share Daiflon had attained. On his own figures, 2 percent of the relevant market is 2.84 million pounds per year. Def. Exh. Nos. 74 and 79. Daiflon [47] never attained more than about one third of that. And the balance sheet that Dr. Gup was referring to exists only in his imagination.

Mr. Carter acknowledged that Daiflon's sales never amounted to more than somewhere in the range of $\$\frac{1}{2}$ million a year. Carter, Tr. 266. Daiflon's financial statement for the fiscal year ending February 28, 1971 (Pl. Exh. No. 9), shows refrigerant sales of $417,475. Its financial statement for the eight months ending October 31, 1971 (Pl. Exh.

No. 14), shows sales of $393,467. Even accepting Dr. Gup's 60¢/lb. figure, this means that Daiflon never had more than about one third of what Dr. Gup saw on his imaginary balance sheet.

Because Dr. Gup was so completely wrong about one of the admittedly most important facts underlying an admittedly critical factor in his calculations, Dr. Gup's entire theory is simply worthless.[14]

---

[14] It is clear that Dr. Gup confused fact with wishful thinking. The only place anything like Dr. Gup's market share figure for Daiflon appears is not in a financial statement showing actual accomplishment, but in the projected statement of income for the period March 1, 1971, through February 28, 1972. Pl. Ex. No. 17. This was the "projection" prepared by Mr. Carter for the purpose of inducing the bank in Galveston to lend Diaflon money (Carter, Tr. 265), and it cannot be used as an alternative basis for damages.

This projection says that one million pounds of R-12 and two million pounds of R-22 would be sold at 50¢/lb. and 75¢/lb., respectively, for a total of $2 million and net income of $200,897.12. A few simple calculations conclusively show the absurdity of that "projection."

The 50¢-75¢ sales prices add up to a weighted price of 66.67¢/lb. $\frac{[(75 \times 2) + 50]}{3}$. That of course was not achieved for the period in question, as price attrition set in. However, Dr. Gup already has told us on behalf of Daiflon that the proper price would have been 60¢/lb. Accepting that for the sake of argument, and the projected sales volume of $2 million, reduces the projected net income of $200,897.12 by about $180,000. But that is before the surcharge and the devaluation! Applying the 10 percent surcharge to the $1,336,860 cost of goods sold shown in Pl. Exh. No. 17, results in a further subtraction from net income of $133,686, putting Diaflon about $113,000 in the red. Of course, the 17 percent devaluation drives the figure even deeper into the red. And that is just from focusing on the projected sales price—without regard to the utter groundliness of the sales volume projection.

D. *Gup's Damage Theory Rests on the Patently Untenable Assumption That Daiflon Would Have Performed Like a Broad Spectrum of Big American Companies in All Their Operations*

Each of the above reasons is, by itself, sufficient to require the entry of judgment n.o.v. because each shows Daiflon's damage claim to be the kind of speculation the law does not permit. But there is another thing about Daiflon's damage claim that requires the entry of judgment n.o.v. And that shows that the claim is worse than just speculation—it is in the realm of fantasy.

[48] The cornerstone of Dr. Gup's opinion concerning the value of Daiflon was the assumption that Daiflon would most likely have had a net income of six percent on its sales. To get there, Dr. Gup simply pulled himself up by his bootstraps and assumed that Daiflon would have performed just as well as a broad spectrum of big American companies, some of them in the chemical business, have performed in all of their operations. Gup, Tr. 1103-1109. Pressed on the justification for his assumption, Dr. Gup admitted:

> "Q. And the only points of similarity that you saw there were both are in the chemical business, that is, Daiflon and these other people, and both are industrial outfits?
>
> A. Yes.
>
> Q. And that's all?
>
> A. Yes."

Gup, Tr. 1109. Not only that, but Dr. Gup admitted that the price Daiflon had to pay its Japanese supplier to obtain refrigerant gas was not a factor in his assessment of the worth of Daiflon! Gup, Tr. 1114.

[49] There is no way a verdict based on that can stand. While plaintiff is entitled to prove the amount of its dam-

ages through reasonable estimates, these estimates cannot be based on mere possibility or speculation. *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d at 677; *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d at 246. Particularly in point is *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F.2d 534 (7th Cir. 1953). There plaintiff distributor had a lot better damage case than Daiflon has here—it was trying to measure its profits according to the profits of the distributor who had succeeded it—and that particular plaintiff still lost. The Court aptly stated:

> "The profits made by Maytag are not the proper measure of plaintiff's damages. There is no evidence to justify the assumption that plaintiff would have sold the same number of Globe ranges that Maytag sold, or that it would have realized the same profit on sales it made. The record is silent as to the comparative cost of doing business by Maytag and plaintiff. Damages to be recoverable must be actual not speculative remote or uncertain." 201 F.2d at 540-41.

To the same effect is *Loew's, Inc.* v. *Cinema Amusements, Inc.*, 201 F.2d 86, 91-92 (10th Cir. 1954).[15]

---

[15] Although not really necessary in view of the other compelling reasons for judgment n.o.v., we list here some other significant unfounded and preposterous assumptions that Dr. Gup made, which make his theory legally impermissible speculation.

To bump up his assumed most likely market growth rate to 12 percent, Dr. Gup used the 20 percent growth figure given in the Du Pont business plan for the automotive aftermarket. Gup, Tr. 1051. But he had to admit that he had no idea of the nature of the buyers and sellers in that aftermarket (Gup, Tr. 1051), and that he had no evidence to support his assumption that Diaflon would have expanded into the automotive aftermarket (Gup. Tr. 1054). In coming up with the most likely value of ten years over which to value Daiflon, Dr. Gup admitted, for example, that his number of years was based on his assumption that Diaflon's products could continue to come from Japan (Gup, Tr. 1065), which of course was not only an unfounded but a disproved assumption. In picking only 5.5 percent as the most likely rate by which to

[50]

E. *Even If Gup Had Been Right in Everything Else, He Did Not Take Into Account the Import Surcharge and the Devaluation of the Dollar, Which Eat Up All of Daiflon's Assumed Net Income With Something To Spare*

Dr. Gup's damage theory also fails because the 6 percent net income, which he assumed Daiflon would have made beginning with his 1972 base year, would in fact have been eaten up with a good bit to spare by the 10 percent import surcharge and the subsequent 17 percent devaluation of the dollar against the yen.

Taken through a series of simple mathematical steps, Dr. Gup acknowledged that, at his assumed 60¢/lb. sales price and 6 percent net income, Daiflon's per pound net income would have been 3.6¢/lb. Gup, Tr. 1123. Dr. Gup further acknowledged that, whichever of Daiflon's answers to defendant's cost interrogatories is used, Daiflon's purchase price for Japanese gas (exclusive of importer's fees, freight in, customs and duty) was something over 38¢/lb.[16] Gup, Tr. 1124-1132.

---

discount Diaflon's future net income to arrive at present worth, Dr. Gup admitted that this was the rate appropriate to an investment in a broad spectrum of big American companies (Gup, Tr. 1096) and that this number was based on his bare assumption that Diaflon would grow like these other companies (Gup, Tr. 1097-1098). This is even though in the spring of 1971 Diaflon was paying Mr. McDonald 9 percent on his loan (McDonald, Tr. 555, 565-566). And Dr. Gup admitted that his theory necessarily means that there is no chance in the world that Daiflon would have made less than 4 percent net income. Gup, Tr. 1119. He also admitted that he did not consider the possibility that Daiflon was not worth anything. Gup, Tr. 1027.

[16] This was on the basis of Dr. Gup's assumption that Daiflon's product mix would have been 60 percent R-22 and 40 percent R-12. Gup, Tr. 1125. Mr. Carter and Mr. Adams both estimated that Daiflon's product mix was about 65%-35% in favor of the more costly R-22. Carter, Tr. 321; McDonald, Tr. 716. And the Arthur

[51] Dr. Gup admitted that when he had done his calculations, he had not taken into account nor even known about the import surcharge, and that he also had not known about nor had taken into account the devaluation of the dollar. Gup, Tr. 1121-1123. He was forced to acknowledge the inescapable proposition that the 10 percent import surcharge would have raised Daiflon's costs by 3.8¢/lb., eating up his assumed 3.6¢/lb. net income. Of course Dr. Gup also had to acknowledge, and did acknowledge, that if the 10 percent surcharge was big enough to do that, the 17 percent devaluation of the dollar against the yen would certainly have been enough to do that. Gup, Tr. 1132-1133.

But Daiflon's case is even worse than that. The 1-1.5 million pounds which Daiflon had in its tanks when the surcharge came in, McDonald Tr. 584-85, would not last forever. And Daiflon was not going to get more. Def. Exh. No. 9.

Gup was forced to acknowledge that he had assumed in his valuation of Daiflon that Daiflon would continue to distribute Japanese gas over the period of his valuation. Gup, Tr. 1065. Notwithstanding Daiflon's implication at trial that this 1-1.5 million pounds would last forever, the incontrovertible fact is that the poundage on hand is only around one-half of Gup's assumed 2.84 million pounds of sales in the first year of his valuation—a valuation that spanned 5-15 years of income, with 10 years most likely. The jury's damage award necessarily assumed the impossible—that Daiflon would have remained in business after the gas on hand ran out.

Young & Co. printout of Daiflon's sales showed about 71 percent R-22, 28 percent R-12, and one percent R-11. Def. Exh. No. 91. Accordingly, the impact of the surcharge and of the devaluation would have been even more severe than we get from Dr. Gup's understatement of the proportion of the costlier gas.

CONCLUSION

Plaintiff failed to produce substantial evidence on every one of the essential elements of its necessary [52] proof. Defendants accordingly are entitled to judgment not withstanding the verdict.

Respectfully submitted,

/s/ D. KENT MEYERS
for JOHN S. ATHENS
DOUGLAS L. INHOFE
Conner, Winters, Ballaine,
Barry & McGowen
2400 First National Tower
Tulsa, Oklahoma 74103

Attorneys for Defendant
Allied Chemical Corporation

/s/ D. KENT MEYERS
for COLEMAN HAYES
Monnet, Hayes, Bullis, Thompson &
Edwards
1719 First National Center West
Oklahoma City, Oklahoma 73102

/s/ D. KENT MEYERS
for HERBERT DYM
JOHN P. RUPP
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Defendant
E. I. Du Pont de Nemours and Company

/s/ D. KENT MEYERS
for JAMES M. STURDIVANT
SIDNEY G. DUNAGAN
Gable, Gotwals, Rubin, Fox,
Johnson & Baker
2010 Fourth National Bank Building
Tulsa, Oklahoma 74119

Attorneys for Defendants
Kaiser Aluminum & Chemical Sales,
Inc., and Kaiser Aluminum &
Chemical Corporation

/s/ D. KENT MEYERS
for HENRY KOLOWRAT
Dechert Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania 19102

Attorneys for Defendant
Pennwalt Corporation

[53]

/s/ D. KENT MEYERS
for PETER BRADFORD
McAfee, Taft, Mark, Bond, Rucks
& Woodruff
Fifth Floor
100 Park Avenue
Oklahoma City, Oklahoma 73102

/s/ D. KENT MEYERS
for J. L. WEIGAND, JR.
Weigand, Curfman, Brainerd, Harris
& Kaufman
830 First National Bank Building
Wichita, Kansas 67202

Attorney for Defendant
Racon Incorporated

/s/ D. KENT MEYERS
D. Kent Meyers
Crowe, Dunlevy, Thweatt, Swinford,
Johnson & Burdick
A Professional Corporation
1700 Liberty Tower
100 Broadway
Oklahoma City, Oklahoma 73102

Attorney for Defendant
Union Carbide Corporation

Dated: April 19, 1979.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 1979, I served upon all counsel of record in this case a copy of the above designated pleading.

/s/ D. KENT MEYERS
D. Kent Meyers

[ATTACHMENT DELETED IN PRINTING]

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil No. 72-C-483-B

DAIFLON, INC., *Plaintiff*,

v.

ALLIED CHEMICAL CORPORATION, et al., *Defendants*.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR NEW TRIAL

TABLE OF CONTENTS

	Page
I. The Applicable Standards	1*
II. Grounds Requiring a New Trial	6
A. The Size of the Damage Award and the Presentation of Untrue Evidence Relating to Damages Requires that the Jury's Verdict Be Set Aside	7
1. The Size of the Damage Award Entered Against the Defendants Makes It Apparent that a Mistake Has Been Committed	7
2. The Damage Verdict Must Be Set Aside Because It Was Based Upon Evidence that Plaintiff's Counsel Knew, or Should Have Known, Was Untrue	10
B. The Monopolization and Conspiracy Findings of the Jury Must Be Set Aside	12

* Page references refer to pages of memorandum as originally filed. Bracketed numbers in text also refer to pages of memorandum as originally filed.

Page

C. A New Trial Also Is Warranted Because of Evidentiary Errors that Prejudiced Defendants' Right to a Fair Trial 13

1. The Failure to Strike Mr. Campbell's Testimony Was Error 13

2. The Court Erred by Admitting Into Evidence Highly Prejudicial Written Statements that Failed to Meet the Standards for Admission Under the Federal Rules of Evidence 15

III. Conclusion 22

Simultaneously herewith, defendants have moved for judgment notwithstanding the verdict (n.o.v.) pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. It is defendants' primary position that judgment should be entered in their favor as sought by that motion.

Alternatively, defendants hereby move for a new trial pursuant to Rule 59 of the Federal Rules. It is defendants' position that if judgment is not entered in their favor pursuant to Rule 50, a new trial should be granted pursuant to Rule 59. Even if their Rule 50 motion is granted, defendants urge that the Court, as an alternative, grant a new trial pursuant to Rule 59 so that the Court of Appeals will be in a position to review this Court's rulings as to both motions simultaneously.

I. The Applicable Standards

Under Rule 59, the Court has broad discretion to see to it that its final judgment does not represent a miscarriage of justice. As stated in 11 Wright & Miller, Federal Practice §§ 2801 and 2803:

> "Rule 59 recognizes the common law principle that it is the duty of a judge who is not satisfied with the

verdict of [2] a jury to set the verdict aside and grant a new trial * * *. 'To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require.' [quoting Judge Parker in *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941)].

* * *

"Rule 59 gives the trial court ample power to prevent what he considers to be a miscarriage of justice. It is his right, and indeed his duty, to order a new trial if he deems it in the interest of justice to do so * * *. Ultimately the motion [for a new trial] invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited.

Rule 59 of the Federal Rules does not itself enumerate all possible grounds that may require the granting of a new trial. But as Wright and Miller make clear, such grounds include any matter relating to the ultimate fairness of the judgment sought to be overturned:

"[T]he rule is stated in broad terms. * * * [T]he general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair, and * * * out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions. The absence of a listing of specific grounds should not obscure the governing principle. The court has the power and duty to order a new trial whenever, in its judgment, this action is required to prevent injustice." *Id.* at § 2805.

The power of a federal judge "to grant a new trial on the ground that the verdict was against the weight of the evidence is clear." *Id.* § 2806. As stated in the leading case of *Aetna Casualty & Surety Co.* v. *Yeatts, supra,* 122 F.2d at 352-53:

> "On [a motion for a new trial] it is the duty of the judge to set aside the verdict and grant a new trial, if he is of **[3]** the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this right is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."

Cited with approval in *Holmes* v. *Wack,* 464 F.2d 86, 88 (10th Cir. 1972), and in *Tidewater Oil Co.* v. *Waller,* 302 F.2d 638, 643 (10th Cir. 1962).

The question then is one of weighing the evidence to reach a just result. Even though substantial evidence may support a verdict, which we strenuously deny in this case, a new trial should be ordered if the verdict is against the weight of the evidence. As explained by Wright and Miller:

> "[O]n a motion for a new trial—unlike a motion * * * for judgment notwithstanding the verdict—the judge may set aside the verdict even though there is substantial evidence to support it. He is *not* required to take that view of the evidence most favorable to the verdict-winner. * * * [T]he judge is free to weigh the evidence for himself." *Id.* § 2806 (emphasis added).

No precise verbal formula has evolved as to how the evidence should be weighed, but certain principles are apparent. First, and obviously, the fact that the jury rendered a verdict must be given due weight, particularly in

litigation involving relatively simple issues "easily comprehended by any intelligent layman." Wright & Miller, *supra*, § 2806. By the same token, however, the trial judge should scrutinize the verdict more closely if the "trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors." *Ibid.*; *Lind* v. *Schenley Industries Inc.*, 278 F.2d 79, 90-91 (3d Cir. 1960). As the court observed in entering judgment n.o.v. and, alternatively, granting a new trial in *Tomac, Inc.* v. *Coca-Cola Co.*, 418 F. Supp. 359, 361 (C.D. Cal. 1976):

[4] "Much has been said about the inadequacy of the jury system to accommodate itself to some of the complexities of modern litigation. Even the Supreme Court has confessed its problems. It may be true that jurors are best able to pick from contested facts in a bank robbery case or a narcotic violation, but there seems less logic in entrusting to laymen economic and legal problems which are wound in strange and confounding theories. * * * [The issues presented in such suits are] too important and far reaching to be left to the misconceptions and misunderstandings of inexperienced jurors. [And, since] the verdict shows that this jury did not understand the economic facts that were important to a correct result, [it is set aside]."

Second, experience gained since the Supreme Court first permitted six-person juries in civil cases in *Colgrove* v. *Battin*, 413 U.S. 149 (1973), indicates that verdicts rendered by such small juries are more likely to be incorrect than twelve-person verdicts. As explained by Justice Blackmun, announcing the judgment of the Court in *Ballew* v. *Georgia*, 435 U.S. 223, 232-39 (1978), empirical studies conducted since 1973 have demonstrated: (1) "that progressively smaller juries are less likely to foster effective group deliberation," which leads at some point to "inaccurate fact finding and inaccurate application of the common

sense of the community to the facts"; (2) "as juries decrease in size * * * they are less likely to have members who remember each of the important pieces of evidence or argument"; and (3) "the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result," while in larger juries the "prejudices of individuals were frequently counterbalanced and objectivity resulted."

As recognized by Justice Blackmun, "the data now raise doubts about the accuracy of the results achieved by smaller * * * panels." 435 U.S. at 234. For example, experiments performed with law students indicate that whereas [5] twelve-person juries reached "correct" verdicts in a range from 71 to 83 percent of the time, six-person juries reach "correct" verdicts in a range of only from 57 to 69 percent of cases. *Ibid.* Indeed, it was found that six-person juries tended to reach "extreme results" 16 percent of the time, whereas twelve-person juries reached such results in less than 4 percent of cases. *Id.* at 234-35. Finally, it was also clear from the data that six-person juries were significantly less likely to return a verdict for a defendant and not to reach a verdict. As Justice Blackmun was forced to conclude:

> "All * * * of these * * * studies * * * raise significant doubts about the consistency and reliability of the decisions of small juries." *Id.* at 235.[1]

This growing recognition that a small jury is more likely to "run away" than the traditional twelve-person jury does not, of course, mean that the verdicts of all six-person juries should be disregarded. What it does mean is that

---

[1] *Accord, e.g.*, Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 Harv. L. Rev. 898, 908 (1979) ("a jury composed of noneconomists or nonbusiness persons may well be unable to grasp evidence in an antitrust case presented in technical language with which it has no familiarity, such as evidence concerning cross-elasticity of demand, market power, [etc.]").

the interest in economy and efficiency that has led to the increasing use of six-person juries places a greater responsibility on the trial judge to scrutinize the verdicts rendered to make sure they are within the bounds of fair judgment applied to the evidence.

In making that analysis, it is recognized that an important consideration warranting very close examination is the amount of damages awarded by the jury compared to the evidence submitted to it. A large disparity between the damage award and the damage evidence not only requires vacation of the award itself, but it must be considered strong **[6]** evidence that the entire proceeding was not fairly considered. *E.g., Williams* v. *Slade,* 431 F.2d 605, 609 (5th Cir. 1970); *Southern Rwy Co.* v. *Madden,* 224 F.2d 320, 321 (4th Cir. 1955).

In the end, however, no listing of considerations can encompass every aspect of the trial that should be weighed. As concluded by Wright and Miller, the best general statement that can made is:

> "If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial." *Id.* § 2806.

II. Grounds Requiring a New Trial

It is abundantly clear that the jury ran away with this case, or inadequately understood the complex issues presented, and rendered a verdict that does not represent a just resolution of the dispute. As demonstrated in defendants' memorandum in support of the motion for judgment n.o.v., there was virtually undisputed evidence at trial that precluded, as a matter of law, a verdict in plaintiff's favor on the monopolization and attempted monopolization claims against Du Pont. Furthermore, even cursory exam-

ination of the record makes it perfectly clear that plaintiff failed to produce substantial, credible evidence of conspiracy. In addition, the verdict as to damages not only is legally unsupportable but is for an amount that cannot possibly be reconciled with the evidence, particularly when viewed in light of the import duty and currency adjustments that occurred beginning in August 1971—which admittedly had a "disastrous" impact on plaintiff's business. Finally, irrelevant and inadequately qualified evidence was admitted of an undeniably prejudicial nature.

[7] For all these reasons discussed in the remainder of this memorandum, we respectfully submit that, whatever may be the result of the pending Rule 50 motion, it is not only the right but the duty of the Court to order a new trial.

A. *The Size of the Damage Award and the Presentation of Untrue Evidence Relating to Damages Requires That the Jury's Verdict Be Set Aside*

The jury returned a verdict of $2.5 million. This amount is grossly excessive in light of the only objective evaluations of plaintiff's real worth. Moreover, the only evidence tendered by plaintiff on damages was based on patently incorrect mathematical computations—errors that plaintiff's counsel had a duty to correct, but did not correct, before the jury retired to consider its verdict. For both of these reasons, a new trial must be granted.

1. The Size of the Damage Award Entered Against the Defendants Makes It Apparent that a Mistake Has Been Committed

The damage award made by the jury was capricious, illogical, unsupportable and unjust. Its size particularly stands out in the fact of testimony as to how small a value was placed on Daiflon at the only time in the course of its

existence—and that was before the import surcharge—when Daiflon was subject to an objective valuation.

Mr. R. D. McDonald, the principal investor in Daiflon, paid $100,000 for a 50 percent interest in Daiflon in early 1971. McDonald, Tr. 523, 554, 572-576. This was a time when, according to the summary of the evidence offered by plaintiff's counsel, Daiflon was going "like a house afire. From January of '71 to June of '71, they did great. They did great." Crawford, Tr. 1386. Mr. McDonald testified that the $100,000 that he paid for his 50 percent **[8]** interest in Daiflon was a fair price arrived at in an arm's length transaction. McDonald, Tr. 559.

The value assigned to Daiflon by Mr. McDonald was consistent with valuations made at about the same time by Mr. Carter and Mr. Adams, from whom Mr. McDonald purchased the Daiflon stock. In February 1971, Mr. Carter and Mr. Adams submitted personal financial statements to The United States National Bank in Galveston in which each, respectively, represented that his 25 percent interest in Daiflon was worth $50,000—for a total value for the company of $200,000. Carter, Tr. 254; Def. Exh. Nos. 7, 8. The jury rendered a verdict for more than ten times that amount!

Indeed, even a damage verdict of $200,000 would have been excessive. When Mr. McDonald purchased his 50 percent interest in Daiflon, and Mr. Carter and Mr. Adams made representations as to the value of their Daiflon stock, the import surcharge and the devaluation of the dollar as against the Japanese yen were only theoretical possibilities. The surcharge became a reality on August 15, 1971, and the devaluation of the dollar as against the yen occurred on December 15, 1971. Bradfield, Tr. 28; Carter, Tr. 176-177; Def. Exh. No. 6. Following imposition of the surcharge, Daiflon did not place any further orders for refrigerant gas with its Japanese supplier. Carter, Tr.

214-215. Continuation of Daiflon's business after that time was impossible.

Plaintiff's response at trial to these events was to assert that "it did not run out of [refrigerant] gas, it ran out of customers" McDonald, Tr. 547, 609; Crawford, Tr. 547, 609; Crawford, Tr. 546-547. What plaintiff necessarily meant by that assertion was that its business was destroyed by an event that preceded the import surcharge and the devaluation—the list price reduction first implemented by Du Pont in March 1971. Plaintiff asked the jury to believe that when **[9]** that reduction began to take hold in the marketplace, in June 1971, "[t]hey were out, and they realized they were out, and the bank advised them to go through whatever they called it, an orderly liquidation or something of that nature." Crawford, Tr. 1388.

Several documents were admitted at trial that show conclusively that the destruction of Daiflon's business was caused, not by the list price reduction in the spring of 1971, but by the import surcharge and the subsequent devaluation of the dollar.[2] But, for the present purpose, there is no reason to dwell on that evidence. Let us accept for now that Daiflon was put out of business as of June 1971. The question then becomes: what was the value of Daiflon as of June 1971 when, but for defendants' alleged wrongdoing, it was in any event going to be put out of business just two months later by events for which the defendants have no responsibility.[3] Since Daiflon had lost money

---

[2] *E.g.*, Def. Exh. No. 9.

[3] Plaintiff made no effort at trial to show that continuing to import refrigerant gas from Japan after August 15, 1971, would have been economically feasible. Indeed, the undisputed evidence was that the imposition of the surcharge and the subsequent devaluation completely destroyed Daiflon's viability. *E.g.*, Def. Exh. No. 9.

heavily throughout its existence,[4] the only possible answer is that **[10]** in June 1971 Daiflon was worthless.[5]

---

[4] Plaintiff's Amended Answer to Interrogatory No. 2 of Defendant's Second Set of Interrogatories gives a breakdown of Daiflon's costs and shows that Daiflon was losing about 15 cents on every pound of R-12 and R-22 that it was selling for 47¢/lb. and 70¢/lb., respectively for a weighted price of 64¢/lb. on the basis of the poundage sold of each of those gases. Def. Exh. No. 78. The interrogatory answer states that the cost information given there "is representative of Daiflon's costs for the years 1970, 1971 and 1972."

Plaintiff's President, Mr. Carter, implied during his direct examination that Diaflon realized a profit on its refrigerant gas sales in 1970. Carter, Tr. 102-103. On cross-examination he had to admit that the $58,000 figure that he had in mind covered not only Daiflon's refrigerant business, but also its admittedly profitable wholesale heating business, which was then part of the company. Carter, Tr. 276. Moreover, in cross-examination concerning Daiflon's financial statement for the year ended February 28, 1971 (Pl. Exh. No. 9), Mr. Carter further admitted that $43,668.48 of the $58,533.96 profit shown there was a gain on the sale of assets, which had nothing to do with refrigerants. Carter, Tr. 249. This financial statement shows refrigerant sales of $417,475 and heating and air-conditioning equipment sales of $687,570. The net profit from both of those operations was only $24,955. The costs shown in the statement include $178,784 of selling expenses which are not allocated between the two operations, but Mr. Carter admitted that the $11,978 in sales commissions and the $43,951 in freight out included in these selling expenses are attributable solely to refrigerants (Carter, Tr. 283, 285), making it clear that Daiflon in fact lost money on its refrigerant operations during the period for which Mr. Carter implied he had a profit.

[5] Plaintiff's evidence was that when the surcharge was imposed, in August 1971, Daiflon had between one and 1½ million pounds of refrigerant gas in its tanks. Carter, Tr. 196; McDonald, Tr. 484-485. Assuming plaintiff would have realized a profit of 3.6¢/lb. on this refrigerant gas but for the alleged antitrust violations by the defendants—a figure suggested by Dr. Benton Gup (Gup, Tr. 1123)—yields a fair market value for Daiflon of between $36,000 and $54,000 at the time it was allegedly driven out of business.

All of this leaves to one side, of course, the absurdities underlying plaintiff's damage theory, as presented by Dr. Gup. There

2. The Damage Verdict Must Be Set Aside Because It Was Based Upon Evidence That Plaintiff's Counsel Knew or Should Have Known, Was Untrue

Compounding the guesswork that Daiflon put before the jury through Dr. Gup, and the utter lack of comprehension that Dr. Gup admitted to concerning the Iskander computer program for whose results he had vouched on direct, the undeniable fact is that program itself contains gross [11] mathematical errors. Those errors, and the further exaggeration they cause in Dr. Gup's already preposterous figures, are described in the attached letter that defense counsel sent to plaintiff's counsel on March 25, 1979, and in the attached affidavit of Dr. Edward F. Stafford.

Plaintiff's counsel were put on clear and specific notice of these errors in open court on March 20 and 23, 1979, and by the hand-delivered March 25, 1979, letter. Apparently, plaintiff's counsel failed to make the inquiries called for in the circumstances. If made, the results would have required of them a repudiation on the record of the damage evidence previously introduced.[6]

---

simply is no basis in the record for the assumption that, despite plaintiff's high costs and other operating problems, plaintiff would have realized a profit of 3.6¢/lb. on its sales of refrigerant gas.

And this also overlooks the inescapable reality that the gas Daiflon had on hand was a bottom-line liability rather than an asset. Daiflon was losing about 16 cents on every pound of R-12 and R-22 that it sold, and it was then selling the gas at an average weighted price of 64¢/lb. See the discussion of Def. Exh. No. 78 in footnote 4 on the preceding page. Thus, if Daiflon had sold the gas on hand at Dr. Gup's projected price of 60¢/lb., all it would have accomplished is that it would have lost 20¢/lb. instead of the 16¢/lb. it did lose on every pound it sold.

[6] The defects in plaintiff's damage evidence were compounded further when plaintiff's counsel invited the jury to speculate concerning the amount of damages that should be awarded. Referring to the numbers that Dr. Gup had presented as "certainly very solid evidence" (Crawford, Tr. 1513), counsel then went on to assert: "But the important thing is he concluded 2.96. Maybe it's

It would not be constructive to engage here in pointed and potentially acrimonious debate about whether the gross mathematical errors in plaintiff's damage presentation require that relief be granted under Rule 60(b) of the Federal Rules of Civil Procedure, or simply constitute [12] grounds for a new trial under Rule 59.[7] Suffice it to say that counsel have a responsibility not to permit a case to be decided on evidence that they know or should know is not true. That duty is absolute. It is not up to opposing counsel to call a witness to contradict the untrue evidence and then hope that the new evidence, rather than the untrue evidence, will be accepted by the jury, and that the jury will not be confused. This is particularly so when, as here, we are dealing with black-and-white propositions of mathematical certainty—not a matter about which experts might debate.

2.7; I don't know. Maybe it's four million; I don't know" (Crawford, Tr. 1513-1514); and "Dr. Gup says 2.96; maybe it's 2.3; maybe it's 2.78; maybe it's 3.6" (Crawford, Tr. 1516).

Particularly in these circumstances, the verdict must be set aside for the additional reason that plaintiff's own evidence shows that the damage award was not established by a preponderance of the evidence. As this Court correctly instructed the jury, to establish by a preponderance of the evidence means to prove that something is more likely so than not so. Dr. Gup's testimony boils down to the proposition that Daiflon's "most likely" fair market value is $2.96 million—give or take about $1.74 million either way. He admitted that the chances that the $2.96 million is the right number are less than 50/50. Gup, Tr. 970. A verdict based on that testimony is simply one not based on facts proved by a preponderance of the evidence.

[7] In Plaintiff's Response to Defendants' Hand-delivered Letter of March 25, 1979, plaintiff moved to strike the March 25, 1979, letter and to have defendants' counsel admonished for "improper" conduct in thus putting plaintiff's counsel on notice. At the same time, however, plaintiff studiously avoided saying anything about the merits of the issue. The inescapable facts are that plaintiff's counsel were given every opportunity, but failed, to repudiate the challenged testimony.

Accordingly, defendants seek a new trial on this ground. Should the Court deem the facts stated before it to be insufficient, we respectfully request leave to take the deposition of Mr. Fadel Iskander (and, if necessary, of others) to substantiate further this ground for a new trial.

B. *The Monopolization and Conspiracy Findings of the Jury Must Be Set Aside*

It is apparent that the jury's findings that Du Pont monopolized and/or attempted to monopolize the non-automotive refrigerant gas replacement market and that the defendants conspired to drive Daiflon out of business are contrary to the weight of the evidence. That evidence is discussed in detail at pages 5-44 of the memorandum in support of defendants' motion for judgment n.o.v., and there is no need to repeat it here. We pointed out in that memorandum that there was a complete failure of proof on the [13] liability issues in this case. At the very least, however, there can be no question but that the jury's verdict on these issues is contrary to the weight of the evidence. Accordingly, whether or not defendants' motion for judgment n.o.v. is granted, they are entitled to a new trial on these issues.

C. *A New Trial Also Is Warranted Because of Evidentiary Errors That Prejudiced Defendants' Right to a Fair Trial*

1. The Failure to Strike Mr. Campbell's Testimony Was Error

Mr. Scott Campbell, an accountant retained by plaintiff, testified that Du Pont had sold various refrigerants in various cylinder sizes at below-cost prices to two customers.[8] On cross-examination, however, Mr. Campbell ac-

---

[8] The irony of this situation is that, as explained in our memorandum in support of defendants' motion for judgment n.o.v. (pp. 28-29), Mr. Campbell did not even purport to show any sales by

knowledged that, because he had not examined any invoices or cancelled checks, he did not know whether Du Pont actually had sold these products to these customers and, if so, the prices at which the products were sold; he acknowledged that his testimony was based on assumption for which he had no supporting facts. He also acknowledged, even more importantly, that he had plotted inaccurately the data that had been provided him as to Du Pont's costs and that it was only because of this inaccuracy that he was able to find hypothetical sales at hypothetical prices below Du Pont's **[14]** total costs. Mr. Campbell's testimony and charts, by his own admission, were "inaccurate and misleading." *E.g.*, Campbell, Tr. 886, 890-891, 899-901, 904-905. The Court, nevertheless, denied Du Pont's motion to strike Mr. Campbell's testimony. Tr. 932-934.

The Court's failure to strike Mr. Campbell's testimony permitted plaintiff's counsel to rely extensively on that testimony in his final argument (Crawford Rebuttal, Tr. 22-25)—even though Mr. Campbell himself had acknowledged that the testimony was inaccurate, misleading and factually unsupported.[9] Moreover, plaintiff's counsel com-

---

Du Pont below du Pont's variable or marginal costs. Thus, the "sales" referred to by Mr. Campbell could not, in any event, be deemed predatory. *E.g.*, Pacific Engineering & Production Co. v. Kerr-McGee Corp., 551 F.2d 790, 795-97 (10th Cir.), *cert. denied*, 423 U.S. 897 (1977); *see also* William Inglis & Sons v. ITT Continental Baking, 1978-2 Trade Cas. ¶ 62,345 (9th Cir. 1978); Murphy Tugboat Co. v. Thomas E. Crowley, 1978-2 Trade Cas. ¶ 62,172 (N. D. Calif.); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 858 (9th Cir. 1977), *cert. denied*, 99 S. Ct. 103 (1979); Hanson v. Shell Oil Co., 541 F.2d 1352, 1358-59 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

[9] Defendants, other than Du Pont, are doubly prejudiced by the Court's refusal to strike Mr. Campbell's testimony because there was absolutely no evidence submitted by plaintiff as to their costs, let alone sales below their costs—yet, the Court inferred that such evidence existed when it instructed the jury that the "Defendants

pounded the error by improperly suggesting to the jury that, to the extent that there was any problem with Mr. Campbell's charts, it was due to the asserted fact that Du Pont had not supplied the information it was obligated to provide in this case. Plaintiff's counsel had the temerity to make this suggestion despite the Court's statement, in sustaining an objection to a question on redirect examination of Mr. Campbell, that

> "[t]he Court gave counsel complete access to all of these reports, documents, books, records and everything, and if counsel didn't give it to him or he didn't go get it, it is no problem at this time." Tr. 919.

The Court also stated:

> "You can't say he or you were not afforded an opportunity to have all the books and records that any of these defendants have, and if they didn't ask for invoices and checks relative to it, you didn't.
>
> **[15]** "But the Court made sure that you had an opportunity to get this information such as the invoices and the checks." Tr. 927.

In sum, a new trial is required because the Court failed to strike Mr. Campbell's testimony and plaintiff improperly attempted, on final argument, to pin the blame on Du Pont for the inaccurate and misleading testimony that Mr. Campbell acknowledged he had presented to the jury.

---

were charged with engaging in predatory pricing." The Court's failure to strike Mr. Campbell's testimony and Mr. Crawford's frequent references to "predatory" pricing by the defendants created reversible error. *See*, Miles & Sons Trucking Service v. McMurtrey, 341 F.2d 9 (10th Cir. 1965).

2. THE COURT ERRED BY ADMITTING INTO EVIDENCE HIGHLY PREJUDICIAL WRITTEN STATEMENTS THAT FAILED TO MEET THE STANDARDS FOR ADMISSION UNDER THE FEDERAL RULES OF EVIDENCE

During the course of the trial, the Court admitted into evidence some 275 exhibits that were offered by plaintiff. Many of these exhibits were not identified by any live witness or in any deposition testimony, and no factual predicate was laid that would have permitted the exhibits to be received as an admission by one or more of the defendants or under the business records exception to the hearsay rule. In addition, a number of exhibits contained inadmissible double hearsay.

The responsibility for this remarkable situation rests squarely with plaintiff, which failed to comply with those provisions of the pretrial order governing the exchange of exhibits. This failure placed defendants and the Court in the unenviable position of having to deal with numerous complex evidentiary questions in a manner that precluded the most careful consideration. As a result, many inadmissible documents were received into evidence to the prejudice of defendants. This constitutes an independent ground requiring the award of a new trial.

The pretrial orders that were entered in this case obviously contemplated, and made provision for, the exchange of all exhibits sufficiently in advance of trial to permit any objections to be raised and disposed of before the trial **[16]** began. Pretrial Order (5-15-78); Supplement to Pretrial Order (6-26-78). Unfortunately, this did not occur. Defendants received from plaintiff prior to trial a listing of approximately 2,000 documents, with an implied representation that plaintiff intended to offer those documents as exhibits during its case-in-chief. Because of the sheer number of the documents, defendants found themselves un-

able to raise objections to individual documents and without a clear idea of the nature of the documentary evidence to which they would be required to respond. Defendants explained this situation to the Court by letter dated August 28, 1978. Then, after the trial date was continued, defendants communicated with plaintiff's counsel by letter dated 1-17-79, to ask whether plaintiff was prepared to represent in good faith that it intended to offer all of these documents during its case. Plaintiff did not respond to that letter.

At the final pretrial conference in this case, which was held on the Friday before trial was to begin defendants again requested that they be informed of the exhibits that plaintiff planned to offer during its case-in-chief. The Court thereupon ordered plaintiff to comply with defendants' request. On March 3, 1979, plaintiff supplied defendants with a new, and somewhat reduced, listing of the exhibits it intended to offer. This step in the direction of compliance came too late, however, to permit defendants to raise prior to trial objections to individual documents and to obtain rulings from the Court—as contemplated by the pretrial orders.

Plaintiff succeeded in making this already difficult, and unfair, situation much worse by offering into evidence as the trial progressed numerous documents that had not been identified by any live witness or in deposition testimony. Following the reading of individual depositions, [17] plaintiff's counsel would approach the bench and seek to have such documents admitted en masse. The situation thus created by plaintiff became so confusing that neither the defendants nor, indeed, the courtroom clerk were able to identify with certainty until near the end of trial which documents were being offered, and for what purpose.

Over defendants' objections, 95 documents eventually were received into evidence without the slightest predicate

being laid for their admission.[10] None of these documents was properly identified in testimony offered at the trial. None was properly qualified as a business record of any of the defendants, or of a third party. No evidence was introduced that might have permitted the Court to conclude that any of the documents contained admissions by a party and were admissible on that basis.

A verdict based on such wholesale disregard of the specific requirements of the Federal Rules of Evidence, and of commitments made when plaintiff executed the pretrial orders in this case, cannot be permitted to stand. An indication of the extent to which the present verdict is in fact premised on inadmissible documentary "evidence" is provided by the fact that of the 28 exhibits that plaintiff's counsel mentioned in the opening portion of his closing summation, 17 were not properly identified by any witness.[11] In addition, many of these 17 documents contained double hearsay—which would have prevented their **[18]** admission even if a witness had been present who might have identified them or qualified them as a bona fide business record of one of the defendants.[12] Rule 805, Fed. R. Evid.

---

[10] *See, e.g.*, 1001, 1009, 1036, 1044, 1244, 1062, 1095, 1203, 1223, 1267, 1296, 1297, 1301, 1303, 1320, 1321, 1322, 1323, 1325, 1326, 1329, 1330, 1335, 1346, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1351, 1353, 1354, 7074, 7092, 7116, 7118, 7122, 3000, 3001, 3010, 3011, 3013, 3014, 3016, 3019, 3025, 3042, 3043, 3045, 3065, 5066, 3074, 3103, 9069, 3503, 3508, 3509, 3510, 3512, 3558, 3666, 3667, 3668, 3669, 3678, 3733, 3734, 8034, 4506, 4512, 4513, 4516, 4521, 4526, 4547, 4554, 4556, 4557, 4558, 4559, 4563, 4577, 4589, 4001, 4005, 4006, 4026, 4031, 4036, 4054, 4134.

[11] Pl. Exh. Nos. 1062, 1303, 1333, 1351, 1092, 7116, 3013, 3016, 3015, 3045, 3510, 4506, 4556, 4557, 4558, 4559, 4036.

[12] Pl. Exh. Nos. 3013, 3016, 3025, 4556, 4558, 4559. Other exhibits that were mentioned in deposition testimony were objectionable on the same ground. *E.g.*, Pl. Exh. Nos. 1009, 1036, 1267, 3000, 3013, 3014, 3065, 3066, 3067, 3068, 3078, 3733, 4512, 4513, 4516, 4521, 4526, 4547, 4554, 4552, 4563, 4589.

Plaintiff's counsel attempted repeatedly to justify the admission of these documents by asserting that plaintiff had found the documents in one of the defendant's files, or that the documents had been turned over by one of the defendants pursuant to plaintiff's discovery requests. Counsel apparently was laboring under the mistaken impressions that any document, or slip of paper, found in a defendant's files is admissible by that fact alone.

Under the Federal Rules of Evidence, however, as under preexisting law, "[t]he requirement of authentication or identification [is] a condition precedent to admissibility * * * *." Rule 901(a), Fed. R. Evid. Plaintiff failed to comply with this most fundamental evidentiary requirement. Although plaintiff's counsel suggested at several points during the trial that some or all of the documents being offered were "self authenticating," none of the documents challenged by defendants was admissible on that theory.[13]

Moreover, even if plaintiff had succeeded in authenticating all of the documents that it offered, the **[19]** documents would be barred by the hearsay rule unless the documents were qualified as a "business record" or a party "admission," as those terms are defined in the Federal Rules of Evidence. Under Rule 803(6), documents may be admitted as business records when they are:

---

[13] Rule 902 of the Federal Rules of Evidence provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to" the following categories of documents: (1) domestic public documents under seal, (2) certain public documents not under seal, (3) foreign public documents, (4) certified copies of public records, (5) official publications, (6) newspaper and periodicals, (7) trade inscriptions and the like, (8) acknowledged documents, (9) commercial paper and related documents and (10) any matter declared by Act of Congress to be presumptively or prima facie genuine or authentic. None of the documents challenged by defendants fit into any of these categories.

> "Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. * * "

Plaintiff did not offer any testimony that would have permitted this Court to conclude that the documents in question were made "at or near the time" of the events referred to in the documents; that any information set forth in the documents was transmitted or recorded by someone with knowledge; that the documents were kept in the course of a regularly conducted business activity; or that it was the regular practice of the defendant in whose files particular documents were found to make or maintain such documents. And even if these essential factual predicates had been established by competent evidence, the documents nevertheless should have been excluded if "the source of the information or the method of circumstances of preparation indicate lack of trustworthiness." Rule 803(6), Fed. R. Evid. The latter requirement was not discussed at length during the course of the trial because plaintiff failed so completely to satisfy even more basic requirements for admissibility.

Contrary to the assertions of plaintiff's counsel, merely because documents are located in a defendant's files (*e.g., Bisno* v. *United States,* 299 F.2d 311, 711, 718 (9th [20] Cir. 1961)), or because a sufficient number of entries or similar documents are located to indicate some regularity in the documents' preparation (*e.g., United States* v. *Plisco,*

192 F. Supp. 337 (D.D.C. 1961)), does not establish that the documents are business records. As Judge Weinstein has stated:

> "Records of regularly conducted activity are not normally self-proving as public records may be [citations omitted]. The testimony of the custodian or other qualified witness who can explain the record keeping of his organization is essential. If the witness cannot vouch that the requirements of Rule 803(6) had been met, the entry must be excluded." (4 Weinstein's *Evidence* 803-143 (1978).

Furthermore, the opinions and conclusions of a defendant's employee, or of a third party, even though expressed in writing, are not admissible as a party "admission" unless the foundation requirements of Rule 801(d)(2) have been satisfied. Under that Rule, the statement must be one within the scope of the declarant's employment. Alternatively, there must be evidence that the defendant authorized the employee to speak on its behalf with regard to the matters discussed in the statement. Neither of these requirements was satisfied here—indeed, they could not have been satisfied because of the complete absence of *any* tstimony concerning the documents in question.

The erroneous admission of documents provides grounds for the granting of a new trial whenever substantial prejudice may have resulted. *See, e.g., Julander* v. *Ford Motor Company,* 488 F.2d 839 (10th Cir. 1973); *Continental Baking Company* v. *Utah Pie Company,* 326 F.2d 161 (10th Cir. 1968). Plaintiff can hardly contend that there was no prejudice here since, as already noted, 17 of the 28 exhibits that plaintiff's counsel used in the opening portion of his closing argument were admitted without any qualifying testimony. Indeed, the verdict in this case provides a **[21]** dramatic illustration of the reasons for excluding the type of evidence plaintiff used. Plaintiff made extensive

use here of intra-company memoranda and communications as party "statements" and "admissions." Through these exhibits, plaintiff caused rumor, speculation and opinions to become "facts" for an unwitting jury. As Judge Weinstein has stated:

> "[A]lthough commentators have suggested that an employee will not make a false statement damaging to his employer, both because he is interested in his employer's welfare, and because he does not wish to jeopardize his job, these reasons, while in part justifying the extension of the doctrine of vicarious admissions [reference omitted] do not vindicate the unqualified admission of statements not based on personal knowledge. Such a statement may often consist of no more than gossip or speculations about the matter in issue. The mere fact that the agent heard it and repeated it does not remove any of the dangers against which the hearsay rule has traditionally guarded. [Reference omitted.]
>
> "The danger is particularly apparent as regards intra-company reports. Certainly, even an employee well-disposed towards his employer may report rumors he has heard, not because of their trust, but because his employer may be interested in the fact that there are rumors. Allowing a report containing rumors not based on personal knowledge to be used indiscriminately against the employer amounts to a wholesale endorsement of the adage, 'where there's smoke, there's fire.' Moreover, it may be doubted, particularly in an era of widespread unionization, whether the theory that an employee would not spread unverified gossip because of fear for his job has much validity. Rather, it would seem a fact of human nature that rumor, unsubstantiated by fact, is at all times prevalent and virulent." 4 Weinstein's *Evidence* 801-132 (1978).

Plaintiff's failure in this case to designate only those exhibits it intended, in good faith, to use in its case-in-chief, as required by the pretrial orders, as well as plaintiff's extraordinary method of offering documents [22] into evidence without supporting testimony and proper foundation, permitted counsel for plaintiff to assert as "fact" what was nothing more than hearsay, rumor, gossip, speculation and opinion. That this caused extreme prejudice to defendants' right to a fair trial cannot be doubted.

III. CONCLUSION

Whether or not defendants' motion for judgment n.o.v. is granted, defendants are entitled to a new trial. There can be no question that "a mistake has been committed." Wright & Miller, *Federal Practice*, § 2806. The jury could not have heeded the Court's instructions, faithfully considered the evidence, and then returned with the verdict that it did in this case.

There was *no* evidence that Du Pont's share of the non-automotive replacement market exceeded 50 percent—yet the jury found to the contrary. There was *no* probative evidence to support a damage award of $2.5 million—yet the jury found that this was the amount of plaintiff's losses. The same can be said for the answers to other interrogatories put to the jury—the answers make no sense in light of the evidence in this case and the Court's instructions.

This jury simply ran away with this case, as six-person juries have been known to do with disproportionate frequency. Whether the jury responded to the emotional appeal inherent in the weeping of plaintiff's counsel, or simply was unable because of the complexity of the economic and legal issues tendered to it to consider the evidence and heed the Court's instructions, the jury's verdict is patently unjust. In addition, the jury's verdict is defective because of the mass of inadequately qualified and

inadmissible [23] exhibits to which the jury was exposed. A new trial therefore must be granted.

Respectfully submitted,

/s/ D. KENT MEYERS
for JOHN S. ATHENS
DOUGLAS L. INHOFE
Conners, Winters, Ballaine,
Barry & McGowen
2400 First National Tower
Tulsa, Oklahoma 74103
Attorneys for Defendant
Allied Chemical Corporation

/s/ D. KENT MEYERS
for COLEMAN HAYES
Monnet, Hayes, Bullis, Thompson
& Edwards
1719 First National Center West
Oklahoma City, Oklahoma 73102

/s/ D. KENT MEYERS
for HERBERT DYM
JOHN P. RUPP
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Defendant
E. I. Du Pont de Nemours and Company

/s/ D. KENT MEYERS
for JAMES M. STURDIVANT
SIDNEY G. DUNAGAN
Gable, Gotwals, Rubin, Fox
Johnson & Baker
2010 Fourth National Bank Building
Tulsa, Oklahoma 74119
Attorneys for Defendants
Kaiser Aluminum & Chemical Sales,
Inc., and Kaiser Aluminum &
Chemical Corporation

/s/ D. KENT MEYERS
for PETER BRADFORD
McAfee, Taft, Mark, Bond, Rucks
& Woodruff
Fifth Floor
100 Park Avenue
Oklahoma City, Oklahoma 73102

[24]

/s/ D. KENT MEYERS
for HENRY KOLOWRAT
Dechert Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania 19102

Attorneys for Defendant
Pennwalt Corporation

/s/ D. KENT MEYERS
for J. L. WEIGAND, JR.
Weigand, Curfman, Brainerd,
Harris & Kaufman
830 First National Bank Building
Wichita, Kansas 67202

Attorneys for Defendant
Racon Incorporated

/s/ D. KENT MEYERS
for D. KENT MEYERS
Crowe, Dunlevy, Thweatt, Swinford,
Johnson & Burdick
1700 Liberty Tower
100 Broadway
Oklahoma City, Oklahoma 73102

Attorneys for Defendant
Union Carbide Corporation

Dated April 19, 1979.

CERTIFICATE OF SERVICE

I hereby certify that on this 2d day of May, 1979, I served upon all counsel of record in this case a copy of the above designated pleading.

/s/ D. KENT MEYERS
D. Kent Meyers

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. 72-C-483

DAIFLON, INC., *Plaintiff*,

v.

ALLIED CHEMICAL CORPORATION, et al., *Defendants*.

AFFIDAVIT

COUNTY OF OKLAHOMA
STATE OF OKLAHOMA, SS:

EDWARD F. STAFFORD, being duly sworn, deposes and says:

1. I am Assistant Professor of Business Administration in the College of Business Administration at the University of Oklahoma. I have a Ph.D. in Business Administration and one of my specialties is quantitative business analysis, which includes computer simulation modeling.

2. I have examined the printouts programmed by Fadel F. Iskander [DX-76 in this case], representing a simulation model which uses certain values shown in the chart entitled "Financial Model Used to Determine Value of Daiflon, Inc." [DX-79].

3. There are at least the following mathematical errors in the Iskander program:

a. An erroneous formula in Subroutine "SIM" (lines 79.000 to 79.300) of the program calculates the net income for each of the years of the simulation as equal to the net income in the last year of the simulation.

b. The same Subroutine (line 79.200) contains an erroneous formula for calculating the discount factor for determining present worth. Instead of calculating a constantly *decreasing* present worth of $1 as that dollar is

earned further and further in the future, this erroneous formula results in the present worth of that future $1 income approaching, equaling, and then remaining at $1.

c. I am informed that Dr. Gup testified that year 1 in the model does not contain a growth factor for size of market. However, the same Subroutine (line 79.000) assumes market growth already in year 1. Thus size of market is overstated in year 1 and all succeeding years.

4. To illustrate these errors, I have written a program (reflected in the attached printout) in which I have compared mathematically correct calculations with the incorrect ones reached by applying the Iskander formulas, using all the "low" values (Table 1), "medium" values (Table 2), and "high" values (Table 3) of the Iskander program.

5. The correct calculations using just the "medium" values result in a total value of $1,287,058. Using the incorrect Iskander formulas results in a value of $3,157,851. (See Table 2.) And using the incorrect Iskander formulas created a range of $49,285 to $80,369,630 instead of the correctly calculated range of $41,637 to $12,158,301 for selecting values in executing the Iskander program.

6. This affidavit does not concern itself with the validity of the values used in the Iskander simulation model, nor with the validity of the model itself; it concerns itself solely with the correctness of certain mathematical calculations in the Iskander program.

/s/ Edward F. Stafford
Edward F. Stafford

Subscribed and sworn to before me this 12th day of April, 1979.

Sharon G. Haskell
Notary Public

My Commission Expires:
December 28, 1980
[Seal]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 72-C-483-B

DAIFLON, INC., *Plaintiff*,

vs.

ALLIED CHEMICAL CORPORATION, et al., *Defendants*.

RESPONSE OF DEFENDANTS TO PLAINTIFF'S SUBMISSION PURSUANT TO THE COURT'S SUGGESTED TRIAL PROCEDURE AND APPLICATION FOR STATUS CONFERENCE

This Response of the defendants addresses itself to a series of practical problems which remain in the preparation of this case for jury trial and with which the Court should deal prior to commencement of the trial on September 11, 1978.

Last June the Court signed an agreed Supplement to Pre-Trial Order which provided . .

> "On July 24, 1978, the plaintiff will produce copies of and deliver to the defendants all documents, marked and numbered, to be used at trial.
>
> * * *
>
> "On August 7, 1978, the plaintiff will designate and provide the defendants with a document, reflecting by page and line number, all deposition testimony to be used by it at trial."

The plaintiff's submission included approximately 2,000 separately marked and numbered exhibits which were to be used at trial. Additionally, plaintiff designated 3,077 pages from thirty different depositions to be read to the jury.

All of the defendants were disturbed and perplexed at this massive and wholly unmanageable quantity of documents and deposition testimony the plaintiff proposed to offer. The large number of duplicate documents as well as the apparent irrelevance of many of the documents and deposition testimony to the questions presented in this case indicated to the defendants that plaintiff had not limited its designations to materials it actually intended to use at trial. Therefore, on July 26 defendants called this situation to the Court's attention in an Application wherein we sought appropriate relief and instructions from the Court.

On August 4, the Court held a hearing where this chaotic situation was aired. The Court told plaintiff to furnish the defendants the exhibits it intends to use and to specify the deposition testimony, by page number, it intends to read to the jury. (August 4, 1978 Hrng. Tr., pp. 35, 40, 42.) After this hearing the Court issued and filed on August 7 a Suggested Trial Procedure wherein the Court requested both sides to reduce, where possible, the mass of deposition testimony and documentary evidence so the jury could understand the issues and not be "exhausted by irrelevant, time-consuming preliminary evidence." The parties were asked by the Court to reduce the deposition testimony deemed to be pertinent and relevant to typewritten form and submit to the other side the exhibits each proposed to use at the trial. On August 22, the date for submission of these materials, the plaintiff delivered sixteen deposition transcripts out of thirty it had originally designated. (Plaintiff tells us that the other fourteen transcripts are being reproduced and will be delivered later.) A cursory examination of the sixteen transcripts delivered reveals that plaintiff has not made any meaningful reduction of the volume of proposed deposition testimony. In compar-

ing the sixteen transcripts delivered on August 22 with plaintiff's original submission, we find the following:

Witness	No. of Pages Per Original Designation	No. of Pages Per Court's Suggested Trial Procedure
Wright	194	184
Andrews	18	18
O'Donnell	166	166
Jones	19	21
Broeckelmann	122	122
Karr	39	38
Muse	28	28
Cawthon	66	66
Montrose	36	36
Barnhart	32	32
Kestenbaum	92	89
Gresham	61	59
Stewart	31	32
Stone	39	39
Gennett	96	94
Prevatt	95	95
Total	1,134	1,129

From these sixteen transcripts we find a net reduction of five pages. Plaintiff has eliminated a few pages from each deposition but, by and large, the deleted portions contain the usual banter and objections between counsel that is common in such proceedings. In some instances, we find that plaintiff has actually added testimony not included in its original submission. Plaintiff has not made any reduction in the quantity of deposition testimony it proposes to read. Very few questions and answers have been eliminated.

In response to the second paragraph of the Suggested Trial Procedure, plaintiff apparently has not altered its

position at all with respect to its intention to offer 1,961 exhibits at the trial. We received nothing from the plaintiff on August 22 to indicate that it planned to eliminate any of the exhibits previously delivered.

Defendants, for purpose of this response, must accept the plaintiff's actions in response to the Court's Suggested Trial Procedure as a good faith reaffirmation of its intent to actually read 3,077 pages of deposition testimony to the jury and to read, at least in part, to the jury each of the approximately 1,960 exhibits containing 4,588 pages. If, however, plaintiff actually intends to pare down this mass of paper and not read substantially all of it at trial, the Court and defendants are entitled to know that *now*, so that defendants can efficiently prepare their case and the Court (and the jurors) can be aware of the time this trial will actually take. To learn this on the eve of trial is too late. We are entitled not to be sandbagged.

The six defendants have collectively designated approximately 270 pages of deposition testimony and have marked and delivered to plaintiff 47 exhibits which they plan to offer.

The sum of the evidence both sides plan to offer, exclusive of live witnesses, is as follows:

	Plaintiff	All Defendants	Total
Deposition Witnesses	30	12	42
Deposition Pages To Be Read	3,077*	270	3,347
Exhibits	1,961	47	2,008

Defendants are in the same position that we were in when we came to the Court on August 4, if not worse. We

* This is the total of deposition pages in the original submission. We do not have all of the transcripts under plaintiff's second submission and thus cannot give the Court the new total.

thought one of the main purposes of discovery and pre-trial proceedings was to pare down, organize and simplify the evidence to enable the trial to go forward in an orderly and expeditious manner so that the jury will not be exhausted. We are now faced with what we estimate to be 100 hours of deposition testimony (assuming it can be read to the jury at a 30-page per hour rate), plus untold days of reading from over 2,000 exhibits (containing over 4,500 pages), not to mention the time involved in presenting the testimony of the witnesses.

The Court's Suggested Trial Procedure requests that we present objections to each of the 2,000 exhibits the plaintiff has delivered to us by Monday, August 28. We find ourselves wholly unable to provide such a document-by-document list of objections, and must inform the Court that we have no choice but to wait until the evidence is actually offered at the trial so that we may object to it in context. We have no way at this time of knowing what the plaintiff proposes to prove with the evidence in its present state. Our interpretation of the Court's Suggested Trial Procedure was for the parties to actually make an offer of proof so that the other side could intelligently and with some degree of precision make objections. This would not only enable the parties, but also the Court, to have a grasp of what we are going to be dealing with at the trial. Given the present state of affairs, the litigants and the Court are going to trial on September 11 in the dark.*

We do not believe that justice requires a jury to sit for three or more weeks and listen to the reading of deposition testimony which, for the most part, we feel is either

---

* There is one additional problem. Under the Supplement to Pre-Trial Order defendants are to supplement their list of witnesses by August 28 but, in light of the fact that we are still in the dark as to the nature of plaintiff's case, it may be necessary for defendants to call additional witnesses, not included on our August 28 list, depending on the case presented by plaintiff at trial.

irrelevant or cumulative. Nor do we believe that a jury could realistically cope with the 2,000 exhibits that plaintiff apparently intends to attempt to introduce. The jury simply could not grasp and understand the issues when the evidence is presented in such a disorganized and unmanageable manner. The Court's calendar presently has this case scheduled to be tried for three weeks in September and three weeks in November. Faced with the enormity of plaintiff's confused case, we do not see that the trial can realistically be expected to be completed within that time frame. This also complicates jury selection because many jurors will no doubt be unable to sit for such an extended and indefinite period of time.

The defendants want to begin the trial on September 11. Delay is not our purpose. We are, however, compelled to once again call to the Court's attention and complain about the plaintiff's actions.

We ask that the Court call a status conference at its earliest convenience so that we can once again attempt to resolve the procedural bottlenecks which we believe present a fatal impediment to an orderly and just trial. Defense counsel have labored long and diligently in an effort to get this case ready for trial on September 11. We do not want this to be lost in a maze of obfuscation and chaos unnecessarily created by the plaintiff.

DATED this 25th day of August, 1978.

/s/ JAMES M. STURDIVANT
James M. Sturdivant of
GABLE, GOTWALS, RUBIN, FOX,
JOHNSON & BAKER
20th Floor, Fourth National Bldg.
Tulsa, Oklahoma 74119
(918) 582-9201

For All Defendants.

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of August, 1978, a copy of the within and foregoing RESPONSE OF DEFENDANTS TO PLAINTIFF'S SUBMISSION PURSUANT TO THE COURT'S SUGGESTED TRIAL PROCEDURE AND APPLICATION FOR STATUS CONFERENCE was mailed to B. Hayden Crawford, 1714 First National Building, Tulsa, OK 74103, Joel L. Wohlgemuth, Philtower Building, Tulsa, OK 74103, and Frank Gregory, Philtower Building, Tulsa, OK 74103, with postage fully prepaid thereon.

/s/ JAMES M. STURDIVANT
James M. Sturdivant

[ADDITIONAL ATTACHMENTS DELETED IN PRINTING]

Supreme Court, U. S.
FILED
JUL 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1895

IN THE

Supreme Court of the United States

October Term, 1979

ALLIED CHEMICAL CORPORATION, ET. AL.,
Petitioners,

VERSUS

DAIFLON, INC.,
Respondent.

Appendix
To Brief of Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

B. HAYDEN CRAWFORD
1714 First National Bank Bldg.
Tulsa, Oklahoma 74103
JOEL L. WOHLGEMUTH
909 Kennedy Building
Tulsa, Oklahoma 74103
FRANK GREGORY
4107 South 72nd East Avenue
Tulsa, Oklahoma 74145
Attorneys for the Respondent, Daiflon, Inc.

TYPE SERVICE CO., Law Brief Printing Division, 507 S. Quaker, Tulsa, OK 74120 (918) 587-2052

No. 79-1895

IN THE
Supreme Court of the United States
October Term, 1979

ALLIED CHEMICAL CORPORATION, ET. AL.,
Petitioners,

VERSUS

DAIFLON, INC.,
Respondent.

Appendix
To Brief of Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

INDEX

Page

Appendix A
Special Verdict, March 30, 1979, United States District Court for the Western District of Oklahoma .. 1a

Appendix B
Proposed Judgment, April, 1979, United States District Court for the Western District of Oklahoma .. 6a

Appendix C
Judgment, April 9, 1979, United States District Court for the Western District of Oklahoma..... 7a

Appendix D
Order, March 22, 1979, United States District Court for the Western District of Oklahoma..... 10a

Appendix E
Plaintiff's Response to Defendants' Motion for Judgment Notwithstanding the Verdict and for New Trial, United States District Court for the Western District of Oklahoma 14a

Appendix F
Petition for Writ of Mandamus and/or Writ of Prohibition, United States Court of Appeals, Tenth Circuit.....146a

Appendix G
Order, August 10, 1979, United States Court of Appeals, Tenth Circuit.....180a

Appendix H
Petitioner's Narrative Statement of the Case, United States Court of Appeals, Tenth Circuit.....182a

Appendix I
Respondents' Narrative Statement of Facts, United States Court of Appeals, Tenth Circuit.....308a

Page

Appendix J
Reply of Petitioner to Respondents' Answer to Petition for Writ of Mandamus and/or Writ of Prohibition, United States Court of Appeals, Tenth Circuit 339a

Appendix K
Order, March 5, 1980, United States Court of Appeals, Tenth Circuit 372a

Appendix L
Letter, March 26, 1980, From B. Hayden Crawford to The Honorable Luther Bohanon 373a

Appendix M
Order, April 7, 1980, United States District Court for the Western District of Oklahoma 375a

Appendix N
Order Denying Second Petition for Rehearing, June 6, 1980, United States Court of Appeals, Tenth Circuit 379a

APPENDIX A

No. CIV-72-483-B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

Daiflon, Inc.,
Plaintiff,

vs.

Allied Chemical Corporation;
E. I. du Pont de Nemours and Company;
Kaiser Aluminum & Chemical Corporation;
Kaiser Aluminum & Chemical Sales, Inc.;
Pennwalt Corporation;
Racon Incorporated;
Union Carbide Corporation,
Defendants.

SPECIAL VERDICT

We, the jury, make the following findings in response to the questions asked:

1. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT TWO OR MORE DEFENDANTS HAVE UNLAWFULLY CONSPIRED WITH EACH OTHER IN VIOLATION OF FEDERAL ANTITRUST LAWS?

   YES ✓ NO_____

   (If your answer is "NO", do not answer the next question but go on directly to answer the questions on page 2.)

2. IF YES, NAME THE DEFENDANTS WHO CON-

SPIRED WITH EACH OTHER TO DO THAT, IN THE SPACE BELOW:

Du Pont, Allied Chemical, Kaiser,
Pennwalt, Union Carbide, Racon.
(All Defendants, Inclusive)

(Whatever your answer to the questions on this page is, go on to answer the questions on page 2.)

March 30, 1979 /s/ Michael Nord
Date Foreman

3. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT DU PONT'S SHARE OF THE NON-AUTOMOTIVE REFRIGERANT GAS REPLACEMENT MARKET DURING THE PERIOD 1969-1972 EXCEEDED FIFTY PERCENT (50%)?

YES ✓ NO_____

4. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT DU PONT HAD THE SPECIFIC INTENT TO ACQUIRE MONOPOLY POWER AND THAT THERE WAS A DANGEROUS PROBABILITY THAT IT WOULD ULTIMATELY DO SO?

YES ✓ NO_____

5. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT DU PONT HAD MONOPOLY POWER DURING THE PERIOD 1969-1972 (THAT IS, THE POWER TO EXCLUDE COMPETITORS FROM THAT MARKET OR TO PRICE AND SELL ITS PRODUCTS WITHOUT REGARD TO THE PRICES BEING CHARGED BY ITS COMPETITORS)?

YES ✓ NO_____

(If your answer is "NO", do not consider or answer any further question on this page.)

(If your answer is "YES", go on to question 6.)

6. IF YOU FOUND THAT DU PONT POSSESSED MONOPOLY POWER, WAS SUCH POWER:

(1) WILFULLY AND UNLAWFULLY ACQUIRED OR MAINTAINED BY DU PONT; OR, INSTEAD WAS IT

(2) LAWFULLY ACQUIRED THROUGH NORMAL GROWTH AND DEVELOPMENT, AS A CONSEQUENCE OF BUSINESS ACUMEN, OR THROUGH HISTORICAL ACCIDENT?

MONOPOLY POWER WAS WILFULLY AND UNLAWFULLY ACQUIRED ✓

MONOPOLY POWER WAS LAWFULLY ACQUIRED_____

(Whatever your answer to the questions on this page is, go on to answer the questions on page 3.)

March 30, 1979 /s/ Michael Nord
Date Foreman

7. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT DAIFLON'S BUSINESS AND PROPERTY LOSSES WERE PROXIMATELY CAUSED:

(1) BY A CONSPIRACY TO DIRECTLY EXCLUDE DAIFLON OR MONOPOLIZE THE RELEVANT MARKET; OR BY DU PONT'S INDIVIDUAL MONOPOLIZATION EFFORTS; OR

(2) FOR OTHER REASONS NOT RELATED TO ANTITRUST VIOLATIONS BY ANY DEFENDANTS?

DAIFLON FAILURE CAUSED BY CONSPIRACY, OR BY DU PONT'S INDIVIDUAL MONOPOLIZATION EFFORTS ✓

DAIFLON FAILURE CAUSED BY REASONS NOT RELATING TO ANTITRUST VIOLATIONS_____

(If you check "failure caused by reasons not relating to antitrust violations," do not answer the remaining questions)

8. IF YOU ANSWERED QUESTION 7 THAT THE FAILURE WAS CAUSED BY CONSPIRACY OR DU PONT'S INDIVIDUAL MONOPOLIZATION EFFORTS, WAS THE SUBSTANTIAL CAUSE CONSPIRACY, DU PONT'S INDIVIDUAL MONOPOLIZATION EFFORTS, OR BOTH?

CONSPIRACY ONLY_____

DU PONT'S INDIVIDUAL MONOPOLIZATION EFFORTS ONLY_____

BOTH ✓

(Go on to answer question 9.)

9. DO YOU FIND THAT PLAINTIFF HAS PROVED BY A PREPONDERANCE OF THE EVIDENCE THE REASONABLE VALUE OF ITS BUSINESS AND PROPERTY LOSSES, OR DO YOU FIND THAT ITS EVIDENCE IS INSUFFICIENT OR TOO SPECULATIVE?

HAS PROVED THE VALUE OF ITS LOSSES ✓

EVIDENCE INSUFFICIENT OR TOO SPECULATIVE_____

(If you checked "evidence insufficient or too speculative," do not answer the remaining question.)

10. IF YOU ANSWERED QUESTION 9 BY SAYING THAT PLAINTIFF HAS PROVED THE REASONABLE VALUE OF ITS BUSINESS AND PROPERTY LOSSES, STATE HERE THE DOLLAR AMOUNT OF THAT VALUE:

$2,500,000.00

March 30, 1979 /s/ Michael Nord
Date Foreman

APPENDIX B

No. 72-C-483-B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

DAIFLON, INC.,
Plaintiff,
vs.

ALLIED CHEMICAL CORPORATION;
E. I. DUPONT DE NEMOURS AND COMPANY;
KAISER ALUMINUM & CHEMICAL CORPORATION;
KAISER ALUMINUM & CHEMICAL SALES, INC.;
PENNWALT CORPORATION;
RACON INCORPORATED;
and UNION CARBIDE CORPORATION,
Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Luther Bohanon, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its special verdict, it is ORDERED AND ADJUDGED

That the plaintiff, Daiflon, Inc., recover of the defendants, Allied Chemical Corporation, E. I. DuPont de Nemours and Company, Kaiser Aluminum & Chemical Corporation, Kaiser Aluminum & Chemical Sales, Inc., Pennwalt Corporation, Racon Incorporated, and Union Carbide Corporation, the sum of $7,500,000.00, which is threefold the damages sustained by plaintiff as determined by the jury, with interest at the rate of 10% per annum as provided by law, reasonable attorneys' fees to be subsequently determined by the Court, and its costs of action.

DATED at Oklahoma City, Oklahoma this _____ day of April, 1979.

_____
CLERK OF COURT

APPROVED:

_____
The Honorable Luther Bohanon
United States District Judge

APPENDIX C

No. CIV-72-483-B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

DAIFLON, INC.,
Plaintiff,

vs.

ALLIED CHEMICAL CORPORATION;
E. I. DUPONT DE NEMOURS AND COMPANY;
KAISER ALUMINUM & CHEMICAL CORPORATION;
KAISER ALUMINUM & CHEMICAL SALES, INC.;
PENNWALT CORPORATION;
RACON INCORPORATED;
and UNION CARBIDE CORPORATION,
Defendants.

JUDGMENT

This action came on for trial before the court and a jury, the Honorable Luther Bohanon, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its special verdict, it is ORDERED AND ADJUDGED

That the plaintiff, Daiflon, Inc., recover of the defendants, Allied Chemical Corporation, E. I. DuPont de Nemours and Company, Kaiser Aluminum & Chemical Corporation, Kaiser Aluminum & Chemical Sales, Inc., Pennwalt Corporation, Racon Incorporated, and Union Carbide Corporation, the sum of $2,500,000.00 which are the damages sustained by plaintiff as determined by the jury, with interest at the rate of 10 percent per annum as

provided by law, reasonable attorneys' fees and costs to be subsequently determined by the court.

Dated this 9th day of April, 1979.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 4-9-79

APPENDIX D

No. CIV-72-483-B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

DAIFLON, INC.,
Plaintiff,

vs.

ALLIED CHEMICAL CORPORATION,
et al.,
Defendants.

ORDER

The extremely large number of exhibits at issue in this case precludes a detailed discussion by the court of each exhibit's admissibility. Lists have been prepared, attached hereto, recording the court's rulings. Where admission is refused, it is generally because the relevancy or competency of the exhibit has not been established, or because it is unduly prejudicial relative to its probative value, or unduly confusing or illegible, or because it involves inadmissible hearsay.

Where plaintiff's request for admission designated only a portion of an exhibit, only that portion has been considered, and only that portion, if any, has been admitted into plaintiff's case. The remaining portions of such documents are admitted only to the extent that defendants choose to refer to such in presenting their view of an exhibit's significance, and, then, only to the extent such portions are admissible under the rules of evidence.

Plaintiff has previously been requested by the court to furnish in writing the basis for each exhibit's proposed admission. Any of plaintiff's exhibits not referred to on

the attached lists, whose admissibility is heretofore unresolved, are denied admission at this time as not having been submitted to the court in timely fashion and proper form.

Dated this 22nd day of March, 1979.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

ADDENDUM TO ORDER

As to the disputed Pennwalt documents, the following exhibits, or designated portions thereof, are admitted:

4001	4005	4008	4026	4028
4031	4036	4042	4134	4135
4006				

The following exhibits are denied admission:

4000	4003	4007	4076	4142

As to the disputed Racon documents, the following exhibits, or designed portions thereof, are admitted:

4000	4003	4007	4076	4142

As to the disputed Racon documents, the following exhibits, or designed portions thereof, are admitted:

5000	5001	5002	5003	5004
5005	5006	5027	5036	5164
5165				

Exhibit 5007 is denied admission.

As to the disputed Allied Chemical documents, the following exhibits, or designated portions thereof, are admitted:

3000	3001	3010	3011	3013
3014	3016	3019	3025	3042
3043	3045	3066	3074	3103
3065	9069			

The following exhibits are denied admission:

3002	3007	3009	3015	3033
3041	3046	3057	3125	

As to the disputed Kaiser Aluminum documents, the following exhibits, or designated portions thereof, are admitted:

3503	3508	3509	3510	3512
3560	3666	3669	3678	3679
3733	3734	8030	8034	3558

The following exhibits are denied admission:

3667	3668	3675	3676	3677
3680	3682	8000	8032	8042
8008	8053	8056	8062	

As to the disputed Union Carbide documents, the following exhibits, or designated portions thereof, are admitted:

4500	4501	4506	4512	4513
4516	4521	4526	4547	4552
4554	4556	4557	4558	4559
4563	4577	4589		

Exhibits No. 4569 and 4593 are denied admission.

As to the disputed DuPont documents, the following exhibits, or designated portions thereof, are admitted:

1001	1009	1015	1036	1044
1062	1065	1095	1203	1223
1260	1267	1274	1296	1297
1301	1303	1308	1309	1311
1320	1321	1322	1323	1325
1326	1329	1330	1335	1336
1337	1339	1340	1341	1342
1343	1344	1345	1346	1347
1348	1351	1353	1354	7074
7092	7116	7118	7122	

The following exhibits are denied admission:

1000	1024	1041	1045	1046
1048	1049	1051	1052	1067
1076	1077	1087	1100	1101
1103	1186	1187	1190	1191
1193	1195	1215	1216	1217
1220	1221	1229	1255	1268
1270	1271	1272	1299	1302
1307	1317	1327	1328	1331
1332	1333	1334	1338	1349
1350	1352	7000	7015	7035
7037	7047	7053	7054	7055
7058	7059	7066	7067	7071
7072	7073	7076	7078	7079
7082	7090	7091	7094	7100
7101	7102	7123	7124	

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. 72-C-483-B

DAIFLON, INC.,
Plaintiff,

vs.

ALLIED CHEMICAL CORPORATION,
et al.,
Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR NEW TRIAL

JOEL L. WOHLGEMUTH
1100 Philtower Building
Tulsa, Oklahoma 74103

B. HAYDEN CRAWFORD
1714 First National Building
Tulsa, Oklahoma 74103

FRANK GREGORY
1714 First National Building
Tulsa, Oklahoma 74103

INTRODUCTORY STATEMENT

On March 30, 1979 following approximately nine hours of deliberation, the duly constituted jury in this case returned its Special Verdict. The jury specifically and consistently answered the ten questions comprising the Special Verdict, with the foreman signing and dating each of the three pages upon which the questions were written. The defendants thereafter requested that the jury be polled, and they were so polled. Each juror unequivocally

answered that he concurred in the Special Verdict of the jury.

The Special Verdict came at the conclusion of a four week trial which capped close to seven years of hard fought, complex antitrust litigation. During the course of the trial the plaintiff, Daiflon, Inc. ("Daiflon") called twenty-five witnesses, and 276 of its exhibits were admitted into evidence. At the conclusion of plaintiff's evidence defendants jointly moved for a directed verdict and presented considerable oral argument in support thereof. The plaintiff responded with oral argument of counsel, and contemporaneously submitted a brief in opposition to the motion. The Court did not grant the defendants' motion.

Defendants then proceeded with their evidence which involved the testimony of five witnesses and the introduction of approximately 100 exhibits. None of the witnesses called on behalf of the defense were employees or representatives of defendants.[1] The motion for directed

---

[1]The witness list of defendants, filed of record March 19, 1979, approximately 2-1/2 weeks into trial, listed twenty witnesses, seven of whom are employees of defendants. (Messrs. Gordon, Sorensen, Heaney, Wright, Regan, McHugh, Polaneczky). Defendants' failure to call any of their employees or representatives (except McHugh, a Carbide programmer) to testify at trial was particularly surprising in view of not only the witness list, but also the opening statements of counsel, *e.g.*:

> "Our witness who will testify was the man who was the overall supervisor of our refrigerant business together with some other areas, and he will testify that if there had been a conspiracy with the other defendants as has been alleged in this case, he would have known about it, and he will testify unequivocably that Carbide was not involved in any conspiracy with anybody. He will tell you a little bit about the pricing in the industry because its much like when you buy a car *** but the significant thing he is going to tell you is that Carbide reached its pricing decisions without the need of or the benefit of any conspiracy with anybody else." Opening Argument of D. Kent Meyers, pp. 60-61.

verdict was renewed upon conclusion of all the evidence, specifically with respect to damages. (Transcript of Trial Proceedings and Testimony taken on March 27, 1979, pp. 2-5). Again, the Court did not grant the motion for directed verdict, and the case was submitted to the jury.

The issues presented to the jury upon a special verdict form were in accordance with the provisions of Rule 49 F.R.Civ.P. The Court will recall that defendants, approximately three weeks into trial, proposed to the Court that the issues presented in this case should be individually and specifically determined by the jury, and accordingly suggested submitting the case on a special verdict form. Daiflon opposed the procedure generally, filing a brief in opposition to the request for a special verdict, and later filing a supplemental brief. The special verdict form had the full and unequivocal support of defendants.

By its Special Verdict the jury made the following findings[2]: That all defendants (Allied Chemical, DuPont, Kaiser, Pennwalt, Racon and Carbide "inclusive") conspired with each other to violate the federal antitrust laws (Special Verdict Findings 1 and 2); that DuPont's share of the relevant market during the period 1969-1972 exceeded 50% (Special Verdict, Finding 3); that DuPont had the specific intent to acquire monopoly power and that there was a dangerous probability that it would ultimately do so (Special Verdict, Finding 4); that DuPont had monopoly power during the period 1969-1972 (Special Verdict, Finding 5); that such monopoly power was willfully and unlawfully acquired (Special Verdict, Finding 6); that Daiflon's business and property losses were proximately caused by defendants' unlawful conspiracy *and* DuPont's individual monopolization efforts (Special Verdict, Find-

[2]In the 52 page brief submitted by defendants in support of their motion for judgment notwithstanding the verdict, the special verdict of the jury is barely acknowledged.

ings 7 and 8); that the plaintiff proved by a preponderance of evidence the reasonable value of its business and property losses, and that its evidence was not unduly speculative (Special Verdict, Finding 9); and that the reasonable value of Daiflon's business and property losses was Two Million Five Hundred Thousand Dollars ($2,500,000.00).

On April 9, 1979 the Court entered judgment in favor of Daiflon against defendants in "the sum of $2,500,000.00 which are the damages sustained by plaintiff as determined by the jury, with interest at the rate of 10% per annum as provided by law, reasonable attorneys' fees and costs to be subsequently determined by the Court."[1] Within the time prescribed by Rules 50 and 59 F.R.Civ.P. defendants have moved for judgment notwithstanding the verdict (hereinafter "Judgment n.o.v. Brief") and for a new trial. The Judgment n.o.v. Brief is premised upon the following grounds:

> "1. Plaintiff failed to prove substantial evidence of monopolization or attempted monopolization by DuPont.
>
> 2. Plaintiff failed to produce substantial evidence of conspiracy.
>
> 3. Plaintiff failed to produce substantial evidence of impact and damages." (Motion for Judgment Nothwithstanding the Verdict and For New Trial, p. 1, filed April 18, 1979).

Defendants' enlarge upon each of the foregoing propositions in their Judgment n.o.v. Brief.

---

[1]Daiflon has pointed out that the Court's form of judgment is inadequate for the reason that it does not include treble damages as required by 15 U.S.C. §15. (See Motion to Include Treble Damages in Judgment Pursuant to 15 U.S.C. §15 and supporting memorandum brief, filed April 12, 1979).

Defendants state that it is "their primary position that this Court should enter a judgment as requested by that motion." (Memorandum in Support of Defendants' Motion for New Trial, p. 1). Defendants have, in the alternative, moved for a new trial in accordance with the provisions of Rule 59 F.R.Civ.P. The motion for a new trial is based upon the following grounds: (a) the verdict is contrary to the law and the weight of the evidence on all counts; (b) the damage award is excessive and was apparently "given under the influence of passion and prejudice;" (c) the damage award was based upon evidence that counsel for plaintiff knew or should have known as untrue; (d) error of the court in failing to strike the testimony of Scott Campbell; (e) error of the court in admitting certain of plaintiff's exhibits into evidence. Propositions I through VII of Daiflon's argument, *infra.*, relate to the motion for judgment n.o.v., while the remaining propositions deal with the motion for new trial.

ARGUMENT

PROPOSITION I

DEFENDANTS HAVE MISSTATED THE FUNDAMENTAL STANDARDS APPLICABLE TO CONSIDERATION OF A MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT.

The Judgment n.o.v. Brief, in excess of fifty pages in length, is remarkable not much for what it includes, but rather for what it omits. For example, while defendants speak in terms of "Rule 50" and "motions for judgment n.o.v.," the controlling provisions of Rule 50(b) F.R.Civ.P. are not recited and since that is the rule under which defendants proceed, let us at the outset examine the specific language of the rule:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any

> reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion***."

The meaning of Rule 50(b) is not difficult to ascertain: Questions of fact must be decided by the jury and may not be re-examined by the Court; however, following return of the verdict and upon a motion for judgment n.o.v., the court may determine the *legal question* of whether there is sufficient evidence to raise a question of fact to be presented to the jury. Wright & Miller, *Federal Practice & Procedure,* §2522, p. 538. In view of the contents of defendants' Judgment n.o.v. Brief, the language of Rule 50(b) is especially critical. In essence, a party is not given the latitude under Rule(b) to reargue or resubmit, perhaps in a way not done at trial, issues of fact which have been determined by the jury. Rather, the question is merely whether sufficient evidence existed, as a matter of law, to present questions of fact to the jury for its determination.

Daiflon respectfully submits that the Judgment n.o.v. Brief is a skillful, albeit improper, effort to have this Court resolve dispositive factual issues which were clearly answered by the jury in its Special Verdict. To accomplish this defendants have (a) collected mere fragments of evidence which they perceive to be helpful to their position, (b) wholly ignored all the evidence favorable to Daiflon, (c) applied certain principles to their evidentiary arguments which are, as will be shown, demonstrably wrong, and (d) materially contravened the principle that Daiflon is entitled to have this Court accept as true all reasonable inferences to be drawn from the facts presented.

Defendants take great care in their motion and brief to emphasize the "requirement" that the Court determine the existence of "substantial evidence" of conspiracy, attempted monopolization and monopolization as a

prerequisite to the denial of the motion for judgment n.o.v. (*See* e.g., Motion for Judgment Notwithstanding the Verdict and For New Trial, p. 1; Judgment n.o.v. Brief, pp. 2, 5, 27, 31, 51). Defendants conclude their presentation by stating:

> "Plaintiff failed to produce substantial evidence on every one of the essential elements of its necessary proof. Defendants accordingly are entitled to judgment notwithstanding the verdict." (Judgment n.o.v. Brief, pp. 51-52).

The requirement that the verdict be supported by "substantial evidence" (not the law of this circuit) has been criticized by Professors Wright and Miller:

> "A number of decisions say that the motion must be granted unless there is 'substantial evidence' in opposition to it. It is very doubtful that the adjective has anything of value, particularly when, as in a leading case, 'substantial' evidence is defined in terms of evidence that would lead reasonable men to different conclusions." (Wright & Miller, *Federal Practice & Procedure,* §2524, p. 546).

In *Boeing Company v. Shipman,* 411F.2d 365, 393-394 (5th Cir. 1969) Judge Rives makes the following observation:

> "***I note that, notwithstanding all the variations which the Supreme Court has played on its sufficiency theme, I have been unable to find a single instance in which the Supreme Court has used 'substantial' in any of its articulation of the constitutional standard." (cited with approval by Wright & Miller, *Federal Practice & Procedure,* §2524, P. 546, fn. 43).

Let us look specifically at the law of this circuit regarding motions presented under Rule 50(b). Defendants cite *Barnett v. Life Insurance Company of the Southwest,* 562 F.2d 15 (10th Cir. 1977) for the proposition that the plaintiff, although entitled to all

reasonable inferences, "still has the burden of establishing a *prima facie* case in responding to a motion for judgment n.o.v." (Judgment n.o.v. Brief, p. 1) Essentially, *Barnett* involved a jury verdict for compensatory and punitive damages based upon a claim of fraud under Oklahoma state law. The Court on appeal affirmed the district court's action in granting a motion for judgment n.o.v. on the ground that the plaintiff therein "failed entirely to produce evidence on several of the essential elements of fraud***." (*Id.* p. 19). Citation was made to Oklahoma law that a fraud case should not go to the jury ". . . unless facts are produced from which an irresistable deduction of fraud reasonably arises." (*Id.* citing *Johnson v. Caldwell,* 180 Okl. 470, 71 P.2d 620).

The importance of *Barnett* to this case, defendants' memorandum nothwithstanding, is that the Court does cite in its opinion other important cases from the circuit which disclose the appropriate considerations for passing on a Rule 50(b) motion. The Court stated:

> "The trial court on this motion for judgment n.o.v. by the defendant should have examined the evidence in a light most favorable to the plaintiff, together with the reasonable inferences to be drawn from the facts. The standard to be used by the trial courts is essentially the same as applied for directed verdicts. *See Oldenburg v. Clark,* 489 F.2d 839 (10th Cir.); *Taylor v. National Trailer Convoy, Inc.,* 433 F.2d 569 (10th Cir.); Rule 50(b), Fed.R.Civ.P., and the general common law practice. In *Taylor v. National Trailer Convoy, Inc.,* we held that judgment n.o.v. is proper where '. . . the evidence and all the inferences to be drawn therefrom are so patent that minds of reasonable men could not differ as to the conclusions to be drawn therefrom.' We said in *Symors v. Mueller Co.,* 493 F.2d 972 (10th Cir.):
>
> '. . . A scintilla of evidence is insufficient, of

course, to justify submission of a case to the jury. Nevertheless, a directed verdict or judgment n.o.v. may not be granted unless the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made. *Swearingen v. Sears Roebuck & Co.*, 376 F.2d 637, 639 (10th Cir. 1967).'

And in *C. H. Codding & Sons v. Armour & Co.*, 404 F.2d 1 (10th Cir.):

'The rule for the granting of a directed verdict has been often repeated. Its essence requires that before a motion for a directed verdict shall be sustained the evidence must be "all one way or so overwhelmingly preponderant in favor of the movant that the trial court in the exercise of its sound discretion would be required to set the verdict aside." *Chicago, Rock Island and Pacific R.R. v. Howell,* 10th Cir., 401 F.2d 752 . . ."

The decisions cited by the *Barnett* court are consistent with the principles outlined by Professors Wright and Miller in their treatise:

"In determining whether the evidence is sufficient the Court is not free to weigh the evidence or pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence." Wright & Miller, *Federal Practice & Procedure,* §2524, pp. 543-545.

Moreover, it is the law of this circuit that it is not only error for the trial court to direct a verdict when the evidence is in conflict, but also where "***conflicting inferences may be derived from evidence which is unchallenged." *Gulf Insurance Company v. Kolob Corporation,* 404 F.2d 115, 117 (10th Cir. 1968). This

principle is particularly relevant to the case *sub judice* where the defendants made the tactical decision, following presentation of plaintiff's evidence, to eliminate all but five of their listed witnesses thereby permitting the substantial portion, if not all, of the record established by the plaintiff to go virtually unchallenged.

Finally, recognition should be given to the proposition that the relief sought by defendants in their motion for judgment n.o.v. is considered to be drastic and "should be cautiously and sparingly granted. The court may not substitute its judgment on a question of fact for that of the jury not direct a verdict because the evidence decidedly preponderates for the moving party." *Wilkin v. Sunbeam Corporation,* 377 F.2d 344, 347 (10th Cir. 1967); *Swearingen v. Sears Roebuck & Co.,* 376 F.2d 637, 639 (10th Cir. 1967).[4]

That judgments n.o.v. will be entered in only the clearest and most unusual circumstances applies specifically to antitrust actions. (*See generally,* Von Kalinowski, *Antitrust Law and Trade Regulation,* Vol. 16M, §112.08). In *Continental Ore Company v. Union Carbide and Carbon Corporation,* 370 U.S. 690 (1962), the Supreme Court reversed the circuit court's decision sustaining the granting of a motion for directed verdict, finding that the district and circuit courts had failed to adhere to the requirement that the evidence be viewed most favorably to the non-moving party (370 U.S. at 695-696). Von Kalinowski generally emphasizes the applicability of the rule strictly limiting the use of directed verdicts and judgments notwithstanding the verdict in complex commercial litigation such as antitrust cases, where issues of fact must normally be proved by indirect evidence, and the inferences to be drawn may be

---

[4]Both the *Sunbeam* and *Sears Roebuck* decisions are cited with approval by Wright & Miller at §2524, p. 542, fn. 29.

dispositive. In so doing, he emphasizes that "it is for the jury and not for the court to weigh the evidence," and

> "The very essence of the jury's fact-finding function is to select from among conflicting inferences and conclusions those it considers most reasonable."
> (Von Kalinowski, *supra.*)

The Tenth Circuit has likewise emphasized the principle of minimal interference with the jury's function to evaluate the evidence and draw inferences and conclusions therefrom in the context of antitrust cases. In *Continental Baking Company v. Utah Pie Company,* 349 F.2d 122 (10th Cir. 1965), *rev'd on other grounds,* 386 U.S. 685, the Court considered this issue in the specific context of a predatory pricing antitrust case:

> "A trial court, in determining whether it will grant a motion for a directed verdict or for a judgment n.o.v., should view the evidence in a light most favorable to the party against which the motion is directed and give such party the benefit of all the inferences which the evidence reasonably supports, even though contrary inferences might reasonably be drawn therefrom, and, if the evidence and the inferences so viewed and considered are of such a character that reasonable men in the exercise of a fair and impartial judgment can reach different conclusions, the motion should be denied. In reaching its determination, the court may not pass on the weight of the evidence or decide where the preponderance of the evidence lies. With the exception of clearly incredible evidence, the court should not consider or pass on the credibility of witnesses and should accept as true the evidence in favor of the party against whom the motion is directed." (349 F.2d at 147, citing *Anderson v. Hudspeth Pine, Inc.,* 299 F.2d 874 [10th Cir. 1962]).

Reed Brothers, Inc. v. Monsanto Company, 525 F.2d 486 (8th Cir. 1975), cert. denied, 96 S.Ct. 787, an antitrust action arising from the Southern District of Iowa, is of special signficance to the motions presently before this Court. In that case Reed Brothers, Inc. ("Reed") brought an action for damages pursuant to 15 U.S.C. §15 against Monsanto Company ("Monsanto") claiming that Monsanto had violated the Sherman Act by engaging in unlawful territorial and customer restraints. The jury returned a verdict in favor of Reed in the sum of $59,990.04, but the district court thereafter entered judgment notwithstanding the verdict or, in the alternative, for a new trial, "principally on the grounds of insufficient evidence." (*Id.* p. 488). The Eight Circuit, in an opinion written by Associate Supreme Court Justice Tom C. Clark, retired, sitting by designation, reversed the ruling of the trial court and ordered that the jury verdict be reinstated.

The district court had granted the motion for judgment n.o.v. on the following grounds: (a) there was insufficient evidence of a contract, combination or conspiracy between Monsanto and its distributors to restrict sales and assign territories to submit the issue to the jury; (b) there was insufficient evidence to show that territorial restrictions were enforced by Monsanto; (c) there was insufficient evidence of a contract, combination or conspiracy between Monsanto and its distributors to impose post-sale restraints on where and to whom Monsanto products could be sold; (d) even if Monsanto and its distributors had agreed to certain post-sale restraints, such practices did not constitute a violation of the Sherman Act; (e) the evidence as to the fact of damages and the amount of damages was too speculative and uncertain to justify submission of the issue to the jury. (*Id.* p. 492). With respect to the motion for new trial, the district court determined that in the event the circuit court

of appeals reversed the granting of the judgment n.o.v., the motion for new trial would be granted on the following grounds: (a) the grounds on which the motion for judgment n.o.v. was granted; (b) the verdict was against the clear weight of the evidence; (c) issues involving Monsanto's alleged post-sale restraints should have been submitted to the jury under the rule of reason. (*Id.* pp. 493-494).

With respect to the trial court's grant of the motion for judgment n.o.v., Justice Clark concluded:

> "From our examination of the record, we think that the jury could well have concluded that Monsanto's 1969 and 1972 policies directly effected where its distributors could sell and to whom they could sell, which is precisely the sort of restraint forbidden in *Schwinn.* The judgment n.o.v. must therefore be reversed, for as the Supreme Court emphasized regarding judgments n.o.v. in *Tennant v. Peoria and Pekin Union Ry.,* 321 U.S. 29, 35, 64 S.Ct. 408, 88 L.Ed 520 (1944):
>
> 'Courts are not free to reweigh the evidence and and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'" (*Id.* pp. 494-95)

In reviewing the evidence, Justice Clark reviewed the portions of testimony selected by defendant in support of the claim that the evidence was insufficient, and stated: "The question of who said what to whom is obviously for the jury to determine, and not the district court***the weight and credibility to be given this testimony — like that of all the witnesses — was a matter for the jury to ponder." (*Id.* pp. 497-498).

Finally, Justice Clark held that the district court had submitted to the jury, under careful instructions, the issue of whether Monsanto and its distributors had adhered to

policies which effectively limited or restricted the territories within which Monsanto's products could be resold. He noted that the jury found such an effect, and accordingly there was "no justification for unseating the verdict." (*Id.* p. 498). Further, the Court held that the grant of a judgment n.o.v. is improper where "***the jury could have found that Monsanto made rebate policies and enforced its 'area of primary responsibility' contracts***." (*Id.*)[5]

It is curious that defendants, in their Judgment n.o.v. Brief, barely allude to the applicable legal standards which must guide this Court's consideration in connection with the motion for judgment n.o.v. There is no discussion whatsoever of the fundamental principles that the court is not free to weigh the evidence, pass on the credibility of witnesses or substitute its judgment of the facts for that of the jury. Rather, defendants choose to rely upon the so-called "substantial evidence" standard, without reference to other principles, and proceed to apply that proposition to bits and pieces of evidence introduced at trial. Defendants' approach is particularly misleading when considered within the perspective of the special verdict of the jury, returned at defendants' behest. Again, defendants simply ignore the importance of the special findings made by the jury.

Daiflon respectfully submits that this Court, upon review of the evidence presented by Daiflon will conclude, as the court concluded at the time the defendants' motions for directed verdict were denied, that the evidence presented by the plaintiff (which went virtually

---

[5]As indicated, Justice Clark also set aside the trial court's alternative grant of the motion for new trial, stating that while such a decision was particularly within the discretion of the trial judge, a different situation exists "where the grant is based on the district court's appraisal of the evidence, for we must be sensitive that the trial judge not interfere with the role of the jury as trier of fact." (*Id.*)

unchallenged) and the reasonable inferences which could be drawn therefrom were more than sufficient to raise issues of the fact for the jury in connection with Daiflon's claims against defendants. The jury thereafter specifically and consistently determined those issues of fact in favor of Daiflon and against defendants.

PROPOSITION II

DEFENDANTS' MISPLACED ARGUMENT WITH RESPECT TO THE WEIGHT OF THE EVIDENCE AND CREDIBILITY OF WITNESSES AT TRIAL IS FURTHER WEAKENED BY PERVASIVE MISREPRESENTATIONS OF THE RECORD

Defendants' n.o.v. Brief, insofar as it purports to set forth an analysis of the evidence presented at trial within the perspective of the "substantial" evidence standard, grossly distorts the record of proceedings before this Court. Daiflon respectfully submits that defendants' mischaracterization of the evidence is readily apparent in most areas, and that it would be an unnecessary and unproductive effort by plaintiff to attempt to respond to each area in which the defendants misconstrue the evidence, omit critical evidence from their discussion, or state conclusions totally unsupported by the record. Moreover, as indicated in Daiflon's discussion under Proposition I, *supra.*, that is not the function of legal argument with respect to a Rule 50 motion. However, so there will be no question in this Court's mind with respect to inadequacy of defendants' effort to reargue questions of fact and credibility, Daiflon shall, in this proposition, address certain of the "facts" which defendants seek to establish. In doing do, Daiflon does not concede that the presentation of argument with respect to the weight of the evidence and credibility of witnesses is proper and appropriate; rather, the sole purpose here is to

demonstrate defendants' use of "selected" parts of the record to make a case at post-trial which the jury did not accept at trial.

A. *Defendants' Recitation of "The Background Facts."*

Following the discussion of the legal standards applicable to a motion for judgment n.o.v., defendants attempt to state the "background facts" relating to Daiflon's claims. (Judgment n.o.v. Brief, pp. 2-5). In essence, this section of the brief represents a highly selective presentation of bits and pieces of and/or references to the testimony of four of plaintiff's twenty-five witnesses (Carter, McDonald, Gup and Jadlow) and two of defendants' five witnesses (Bradfield and Hibdon). Additionally, four exhibits are referred to, but not described: Pl. Exh. No. 1113, Def. Exh. Nos. 7, 8 and 91. Of course, the "background facts" contain no discussion of the price movements effected by defendants during the 1969-1972 period. In lieu of such a discussion, defendants choose to relate the undisputed fact that refrigerant gas is a homogeneous, fungible product. Further, defendants conclude that:

> "The economists who appeared were unanimous in stating that, because of the homogeneous nature of refrigerant gas, one would expect substantial similarity in refrigerant gas prices among the defendants." (Judgment n.o.v. Brief, p. 4)

Defendants do not elect to discuss such issues as the drastic price reduction (while costs were drastically on the increase) of 13% which DuPont instituted, and the other defendants followed, in March of 1971; the subsequent reduction of prices in March of 1972 by all defendants on R-12 and R-22, the staples of Daiflon's business; or the defendants' price hikes of October and December, 1972 following Daiflon's exit from the industry.

Moreover, defendants apparently determined that the pattern which had been established in the industry for the distribution of refrigerant gas, and which continued to predominate during the period of Daiflon's existence, was not of sufficient consequence to merit inclusion as "background" information. Nor did defendants elect to discuss any of the scores of exhibits introduced by plaintiff supportive of the jury's special findings in connection with defendants' antitrust activities. Witness, for example, the following:

Pl. Exh. Nos. 1224 and 1236: These are DuPont documents which disclose directly that during the period June, 1970 through February, 1971 DuPont had embarked upon an investigation of freight rates from Japan to various locations in the United States, including Houston, Daiflon's plant location. What possible use could DuPont, the undisputed price leader of the industry, make of such commercial information other than the obvious, to-wit: DuPont was determining, prior to March, 1971 price reduction, what plaintiff's costs of operation were so that it would know what price level would be required to eliminate the competition encountered from Daiflon. Even if defendants should assume the position that these exhibits do not necessarily establish the conclusions which Daiflon here asserts, can they deny that these exhibits alone are sufficient to create a question of fact for the jury as to whether or not DuPont in fact conducted their freight study for this purpose and whether they subsequently acted upon that study?

Pl. Exh. Nos. 1259, 1264 and 1265: These exhibits reflect that DuPont was engaged, in 1971, in an investigation of the prices paid for refrigerant grades 11, 12 and 22 by customers of the Japanese manufacturer. The importance of these exhibits with respect to the jury questions presented, and the "background" to this action, is undeniable.

Pl. Exh. No. 3013: On April 7, 1970 Mr. Jerry W. Woyahn, Assistant District Sales Manager of Allied Chemical for the Midwestern District, submitted a memorandum to a number of Allied officials including, *inter alia.*, H. C. Hansen, Director of Sales and A. J. Johnston, Manager of Sales:

> "As you know, the Japanese Refrigerant 'Daiflon' is being offered and their much more aggressive approach in '70 is causing real concern. Please let me know of each and every instance where foreign material is purchased and also the amount, and whose account this contractor was. No rumors or excuses by some of customer's salesmen for their own poor selling; just the facts. For example — John Johnson & Son — 3-1000 lb. drums of Daiflon — customer of Klich Refrigeration. *Under no circumstances do I want any conversation regarding 'Daiflon' initiated by us. Do not give our competitor any publicity.* However, if your customer brings it up, exhibit real concern and let them know Allied is very aware of this situation. And you will be kept informed as to what steps are being taken to combat this problem." (emphasis original)

Pl. Exh. No. 3016: H. C. Hansen (Allied Director of Sales) a recipient of Mr. Woyahn's memorandum of April 7, 1970, prepared a memorandum nine days later dealing with "Japanese Daiflon refrigerant," and submitted it to Mr. A. H. Baker, Allied Vice President-Marketing. A copy of this letter is shown to have been delivered to E. L. Granholm, Product Manager of Allied Chemical. The Director of Sales suggests a number of possible actions to counter the threat of Daiflon, including, *inter alia:* (a) dumping "Genetron" (Allied's trade name for refrigerant gas) in Japan; (b) directing the flow of refrigerant from Japan to foreign markets other than the United States; (c) taking the Japanese manufac-

turer out of the business; (d) supplying Japanese manufacturers representatives; (e) selling through wholesalers and giving customers a "functional fee for business obtained in competition against Daiflon". Did Allied's Vice President Baker in fact consider these suggestions by his Director of Sales? If considered, did Mr. Baker institute policies to implement the suggestions? These are questions for the jury. With respect to the grant of functional fees, or off-list discounting, defendants' only comment in its recitation of "background facts" is that "while the list prices of each defendant were similar, there were substantial discounting off-list prices." (Judgment n.o.v. Brief, p. 4).

Pl. Exh. Nos. 3508 and 3512: These exhibits demonstrate that in September of 1971 Kaiser was engaged in an investigation of Daiflon's "net delivered costs and a comparison of that information with Kaiser's distributor costs." The difference reflected on Plaintiff's Exhibit No. 3512 shows that Kaiser's distributors were, at that time (following the March, 1971 price reduction) able to sell refrigerants R-12 and R-22 at prices below those charged by Daiflon. This exhibit was furnished to W. A. Sorensen, Kaiser's National Sales Manager.

Pl. Exh. No. 3687: This document, a competitive status report of Kaiser, certainly provides interesting "background" information on Kaiser's competitive practices during the year 1970. The Kaiser salesman who prepared the memo indicates that Japanese gas is "infiltrating the Springfield area" and that selected contractors are being offered 1,000 pound quantities which are being shipped direct at reduced prices. He recommends that Kaiser ship ton cylinders direct to U.S. Electric Company, a contractor-customer in order that "they can quote the competitive price." (*Id.*) Mr. Sorensen, Kaiser National Sales Manager, accepts the salesman's recommendation to ship ton cylinders direct to that customer, with

the handwritten proviso: "Limit to contractors who have been offered Japanese gas."

Pl. Exh. No. 3733: On March 9, 1972, J. M. Lawlor of Kaiser's Houston office writes to Frank Rose in Dallas, with a copy to National Sales Manager Sorensen, with respect to the "Gas Fight at Houston's O.K. Corral." Lawlor refers to the deteriorating prices on refrigerants in the Houston territory and speculates that "the foreign gas influence in Houston, San Antonio, Austin, Corpus Christi and the Galveston areas" has created an "emotional marketing strategy." Lawlor concludes his memorandum by stating:

> "It goes without saying, gentlemen, that this is a pandora's box and this will not necessarily stay in this territory. We must urgently make decisions as to how we plan to handle this market."

Within the month, Kaiser joined the other defendants in a drastic reduction in the list price of refrigerants R-12 and R-22, the particular grades of refrigerant gas sold by Daiflon.

Pl. Exh. No. 4008: This is an inter-office memorandum prepared by E. S. Ward, Jr., Pennwalt's Marketing Manager. Mr. Ward states that it has come to his "attention that the field sales force are restricting their calls primarily to existing accounts." (*Id.*) He recommends that all full line wholesalers "should be called on to at least establish good rapport." This document, which relates directly to the pattern of distribution which is central to the plaintiff's lawsuit, ties in neatly with the Gresham testimony which shall be discussed later. In any event, it alone raises a fact issue with respect to the basic question of market allocation, and the ultimate issue of the existence of a freely competitive market.

Pl. Exh. No. 4557: This is an internal memorandum dated February 9, 1971 from F. T. Schuhlein of Union Carbide to R. C. Thies with copies to Messrs. Carmody

and Reid. Schuhlein relates that he has received "additional inputs on the competitive activities of the Japanese in the South." After detailing those activities he states that he has requested another Carbide employee, Quinn Harmon, to determine whether the Japanese cylinders have the approval of the Department of Transportation. He concludes: "Whether they are or not, this further move by foreign gas (referring to the establishment of bulk lift tanks) must be considered for its future impact on pricing and the possible movement of wholesaler/fillers into the traditional distribution chain."[6]

Pl. Exh. No. 5027: Approximately nine days following Mr. Schuhlein's preparation of the internal memorandum designated as Pl. Exh. No. 4557, Mr. Snyder of Racon's Houston office wrote a memorandum to J. L. Maurer in connection with the competitive activity of Daiflon. Mr. Snyder states that "there is no doubt in my mind that during the summer of 1971, they will become a very definite factor in the sale of refrigerants to large contractor operations in the South Central area which would include Louisiana, Arkansas, Oklahoma, Texas and New Mexico." Mr. Snyder notes that Racon has already seen the "footprints of this operation" in such areas as New Orleans, Baton Rouge, Tulsa, Oklahoma City, Dallas, Fort Worth, El Paso, Albuquerque and Houston. He then states: "No constructive suggestions to make as to how to combat this situation." (A copy of this memorandum was sent to Maurice J. Knopf, President of Racon.) This memorandum was written approximately one month prior to the 13% reduction.

---

[6]Plaintiff respectfully invites the Court's attention to Pl. Exh. No. 4506, another Carbide document, indicating their deep concern with respect to Daiflon's potential impact or disruption of traditional distribution patterns. (This is discussed in some detail in Propositions II(d) and III, *infra.*)

Pl. Exh. No. 7116: Virginia Chemicals, DuPont's sales agent, reports in a memorandum to D. M. Glover of DuPont that in April of 1970:

> "Increased concern was noted among the wholesalers about the effects of their refrigerant sales to Daiflon's recently accelerated sales activities. Since Daiflon's distribution is not exclusively directed through conventional trade channels, Daiflon could upset the market to an extent far greater than the pounds of refrigerant that would be sold."

Pl. Exh. No. 7122: Another report from Virginia Chemicals to Glover of DuPont wherein it is stated:

> "Wholesalers are naturally concerned about the impact of Diaflon [sic] and Friggen (the German refrigerant). As of now, they are not a serious threat but what probably really worries the wholesalers is that the distributors of these foreign refrigerants may not adhere to traditional U.S. refrigerant distribution policies."

Plaintiff's Exhibit Nos. 1062 and 1065 deserve, as "background information" to Daiflon's claims for relief, special attention. Pl. Exh. No. 1065 is a DuPont trade report prepared by DuPont salesman D. B. Hartman describing a sales call occurring on April 30, 1971 to Mr. Robert Gennett, President of Refrigeration Supplies Distributor. Mr. Hartman's trade report was distributed to seven DuPont employees including R. Wright, Jr., the National Manager for Refrigerants and P. B. O'Donnell, Marketing Manager for the Southwest Region. In this report Mr. Hartman concludes that: "Mr. Gennett is causing quite a stir in the market in the Birmingham area. He is passing on the 13% discount which we offered in order to combat the Japanese refrigerant." DuPont did not choose to call Mr. Hartman as a witness to testify with respect to his conclusions as set forth on Pl. Exh. No. 1065, nor were

Messrs. O'Donnell or Wright called as witnesses.[7] Within the purview of the motion for judgment n.o.v., the appropriate question is whether evidence such as Pl. Ex. No. 1065, together with all reasonable inferences which are permissible therefrom, creates an issue for the jury in connection with the claims asserted by Daiflon. This exhibit is particularly significant when viewed within the perspective of Pl. Exh. No. 1062, which is inter-office correspondence from Luther Cox of Virginia Chemicals to P. B. O'Donnell of DuPont bearing date of April 30, 1971. Cox states:

> "I believe that our new pricing policy will be a great help in combatting the threat of Diaflon [sic]. If there's any sudden changes in this area, Mike and I will let you know promptly."

None of the plaintiff's exhibits discussed above are mentioned by defendants in their incomplete, argumentative approach to the "background facts" of this litigation. In fact, only one of these critical documents, Pl. Exh. No. 1065, is mentioned in defendants' memorandum. (Judgment n.o.v. Brief, p. 25, fn. 6). Particularly significant, in view of the statements contained in Pl. Exh. Nos. 1062 and 1065, is the existence of the following statement at page 24 of defendants' memorandum: "The competition that led DuPont to reduce its list prices in March of 1971 was from the other defendants, not from Daiflon." No citations to the record followed this bald, conclusory statement.

Finally, defendants conclude their short, but pointed presentation of background facts with the statement that "price competition was intense throughout the 1969-1972 period, throughout the United States." Cited as authority for this proposition is Professor James Hibdon of the University of Oklahoma, whose testimony shall now be addressed.

---

[7]However, it should be noted that Mr. Wright was *listed* as a DuPont witness.

B. *The Hibdon Testimony.*

Defendants rely in their motion for judgment n.o.v., as they did at trial, on the expert testimony of Dr. Hibdon (*See esp.* Judgment n.o.v. Brief, pp. 4, 38, 42). The weight to be given to the Hibdon testimony is, as the Court instructed, a question for the jury. Nevertheless, since defendants do once again cite the testimony of this witness to establish the affirmative of certain important issues of fact and law, brief comment should be made with respect to his trial testimony. As the court will recall, Professor Hibdon was employed by counsel for Union Carbide to make an "independent" study of the fluorocarbon industry (Hibdon Direct, Tr. p. 8). In order to carry out this study he was provided with selected materials and depositions including the depositions of Wright, Ward, Napoli, O'Donnell, Sorensen, Regan and Knopf (Hibdon, Cross-examination prior to mid-afternoon recess, Tr. p. 1-2). Although available, he did not read such critical testimony as that contained in the Rose, Gresham, Solon, Montrose or R. B. Ward depositions. (*Id.* pp. 2-3). Nor was Hibdon permitted access to any of the exhibits which Daiflon introduced at trial.

Moreover, his study was of the entire fluorocarbon industry, which includes, *inter alia.*, hairspray, antiperspirant spray, aerosol propellant, oven cleaners, paint, wax, and perfume.[8] (*Id.* p. 3). He testified that he did not do "an exhaustive analysis" of the relevant product market involved in this case, nor did he prepare any charts or other exhibits with respect to that market. (*Id.*) When asked whether the price movements occurring in the years 1971 and 1972 (the decreases in March of 1971 and 1972 and the increass of the fall of 1972) were representative of the other 60% to 70% of the fluorocarbon industry,

---

[8]Dr. Hibdon testified that refrigerant gases comprise "approximately 30 to 40 percent" of the fluorocarbon industry. (*Id.*)

defendants' expert witness responded: "I don't really have factual knowledge of what went on in each segment of the market, of the total market." (Hibdon, Cross-examination following mid-afternoon recess, Tr. p. 16). Perhaps the crux of Hibdon's testimony, and a fair statement of his claimed "independence" came during cross examination when he was asked whether or not he would consider it predatory for DuPont to institute a 13% decrease to combat and drive Daiflon out of the market. He responded:

"Q. (The Witness) If the facts are as you say, but I cannot conceive that they would be.

Q. (By Mr. Crawford) Because you can't conceive DuPont doing that?

A. That's exactly right, not getting at reducing prices, but the costs are extremely high, as I mentioned before, for that sort of activity. It wouldn't be worth it." (*Id.* p. 31).

Finally, Hibdon's predilection to rationalize conduct by DuPont at the expense of his purported independence, is reflected upon further cross-examination wherein he was requested to comment upon a statement in a survey of the fluorocarbon refrigerant market originally prepared for Union Carbide and testified to by the witness for his testimony at trial. In that report it is indicated that "***head to head confrontation with DuPont should be avoided on a price basis. However, efforts should continue towards sharing customer requirements with them." (*Id.* p. 41). Professor Hibdon stated that he understood that analysis to "suggest" that "maybe" they "are not as efficient as DuPont, they don't want to try to undersell DuPont because they are not sure they they can, or underprice DuPont; so they are going to try to get what business they can." (*Id.* pp. 41-42).

The "independence" of the expert Hibdon was a question for the jury, as was the weight of his testimony.

C. *Testimony of Harold David Gresham.*

The testimony of Harold David Gresham ("Gresham") a Kaiser employee during the period July, 1969 to August, 1970 (Gresham Depo. p. 9), is discussed in a single footnote to defendants' memorandum (Judgment n.o.v. Brief, p. 41, fn. 12). In that footnote defendants seek to "explain away" the very damaging testimony given by this witness:

> "Although Mr. Gresham uses the word 'allocation' in his deposition (Gresham Depo., p. 16, it is apparent that Mr. Gresham's definition of that word bore no relation to the definition supplied by plaintiff's counsel — where the kind of market allocation that is of concern under the antitrust laws." (*Id.*)

Defendants then cite two sentences from Gresham's testimony, taken out of context to appear as one statement, but in reality excerpted from separate parts of the deposition. This discussion by defendants is characteristic of the entire thrust of their brief — which involves patent mischaracterizations of the record as part of an effort to reargue questions of fact to this Court which have been specifically and unequivocally determined by the jury.

As the Court will recall, Gresham testified that, during discussions with Mr. Mike Sharp, the Kaiser employee who preceded him in his sales position, he learned that Kaiser was allotted the Port Arthur location of Standard Brass: '***the Port Arthur store would be the sharing of business that we were to receive." (Gresham Depo., p. 14) Sharp explained to Gresham that Kaiser would get the business in Port Arthur and the larger chemical companies "***had the other stores, and this is the way it was allotted." (*Id.* pp. 14-15). He testified that Kaiser's allottment was about every fourth truckload, with the other three truckloads divided about two to one between DuPont and the other companies. (*Id.* p. 15).

The point here is not that the jury was bound to ac-

cept Daiflon's interpretation of the Gresham testimony rather than the interpretation urged by defendants. Rather, it is apparent that defendants have, in footnote 2 to their brief, mischaracterized that testimony, and further have attempted to obscure the proposition that the only issue raised by the motion for judgment n.o.v. is whether the evidence presented, such as the Gresham testimony, was sufficient to create an issue of fact for the jury. Wright & Miller, *Federal Practice & Procedure,* §2524, pp. 541-547.

D. *Defendants' Discussion of "Distribution Patterns".*

A little over one full page of defendants' memorandum is devoted to the subject "Distribution patterns" (Judgment n.o.v. Brief, pp. 41-42). Defendants, understandably, seek to limit the issue of "distribution patterns" to the legality of individual refusals to sell. Defendants state: "In fact, each of the defendants is entitled by law to determine with whom it wishes to do business." (Judgment n.o.v. Brief, p. 41). That simply is not the issue. The significance of the methods established by these defendants to distribute refrigerant gas for replacement puproses is amply covered by plaintiff's exhibits and deposition testimony relating to those exhibits. Without belaboring the point, consider Pl. Exh. No. 4506 wherein Gordon of Union Carbide, the promised witness who did not appear, relates to Carbide management that the "***importers could completely disrupt our distribution pattern which has taken years to develop." This document was received by Napoli, Union Carbide's market manager, on March 15, 1971. Also, a number of plaintiff's exhibits reflect that during April, 1971 O'Donnell of DuPont wrote memoranda to all of his refrigeration sales representatives and agents requesting information with respect to Daiflon's practice of selling ton containers directly to contractors, who are then able to refill smaller cylinders for

resale. (Pl. Exh. Nos. 1244-1248). In these written communications O'Donnell states that the information which he requests is "most important for our current market studies. We ask that you make a diligent effort to uncover how widespread this practice has become," (Pl. Exh. Nos. 1244-1245). He indicates that DuPont is:

> "***anxious to get a picture of the methods of distribution they (referring to Daiflon) plan to follow and the effects it could have on our present form of distribution. Your suggestions as to how you think we can most effectively meet the competitive inroads will be greatly appreciated." (Pl. Exh. Nos. 1246-1248).

The fears expressed by O'Donnell were echoed by evidence obtained from Virginia Chemicals, DuPont's sales agent:

> "With the Daiflon market penetration on the increase, we can expect to see severe continued price competition with this product. The presence of the RIP situation in the southwest along with Daiflon and new variations in price competition threatens to change marketing methods as we presently know them." (Pl. Exh. No. 7092, interoffice correspondence from V. S. Wulfson, Jr. to R. B. Ward, Houston, Texas, October 13, 1971).
>
> * * *
>
> "It has become evident that more and more ton containers are being sold directly to contractors for refilling smaller cylinders. DuPont has asked for our help in determining exactly where this is being done, the sources of supply and volume involved. They consider this matter *URGENT.*" (emphasis original) (Pl. Exh. No. 7107, p. 7, interoffice correspondence from R. B. Ward to Western Region Salesmen, dated April 9, 1971).
>
> * * *

> "Increased concern was noted among wholesalers about the effects of their refrigerant sales on Daiflon's recently accelerated sales activities. Since Daiflon's distribution is not exclusively directed through conventional trade channels, Daiflon could upset the market to an extent far greater than the pounds of refrigerant that would be sold." (Pl. Exh. No. 7116, interoffice correspondence from Paul A. Nelson to R. M. Glover of DuPont, dated April 18, 1970).

It abundantly clear from the evidence that the importance of defendants' traditional, inflexible methods of distributing refrigerant gas were of far more significance to this case than that attributed by defendants in their memorandum. They jury properly took such evidence into consideration in arriving at its Special Verdict.

The matters discussed in this proposition of Daiflon's brief — the "background facts" related by defendants, the testimony of Professor Hibdon, the testimony of Harold Gresham, and the matter of "distribution patterns" — are included only to demonstrate the inadequacy of the approach undertaken by defendants in their memorandum. It is not permissible to support a motion for judgment n.o.v. with a piecemeal discussion of the evidence presented during the course of the antitrust trial. Under Rule 50 it is wholly inappropriate to make an argument to the Court predicated upon the weight of the evidence or credibility of witnesses. As stated by the Supreme Court in *Tennant v. Peoria & Pekin Union Railway Co.*, 64 S.Ct. 409, 412, 321 U.S. 29, 89 L.Ed. 520 (1944):

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial

review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

PROPOSITION III

DEFENDANTS SHOULD NOT BE ALLOWED TO IGNORE THE FACTS (1) THAT THE JURY FOUND THAT THEY ENTERED INTO A PRICE-FIXING CONSPIRACY IN ORDER TO SET PRICES, TEMPORARILY, AT A LOW LEVEL TO DRIVE DAIFLON FROM THE MARKET, OR (2) THAT SUCH PRICE SETTING IS A PER SE VIOLATION OF §1.

In their attack on the jury's finding as to liability and damage, defendants advance a number of theoretical contentions built on their own interpretation of highly complex economic principles. We address these issues subsequently and point out that defendants' characterization of many of the points is fallacious. However, whatever tactical advantages may accrue to the defendants from the present attempt to interject complex economic theories into the case, such attempt ignores (a) the fact that the jury found for the plaintiff as to the price-fixing conspiracy in addition to monopolization, and (b) the fact that such conspiracies constitute a *per se* offense under the antitrust law, so that they stand on their own footing and are fundamentally illegal without regard to all the economic issues defendants seek to raise.

A. *The Nature of the Conspiracy*

The nature of the price-fixing conspiracy alleged by

plaintiff, and proved by its evidence, is a simple one, and can be summarized as follows: Defendants knew that DuPont was generally regarded as the price leader in the industry. They knew, also, that DuPont, like themselves, was concerned about the emergence of plaintiff Daiflon as a potential competitor in the non-automotive aftermarket for refrigerant gas, and they further knew that plaintiff's resources were such that it could not withstand a significant period of "price war" conditions. Accordingly, in the face of its own constantly increasing costs of operation, and expecting that its action would lead the other defendants to follow suit, DuPont cut prices in order to make it uneconomical for Daiflon to continue in the industry and thus to force it out of business. The other defendants understood the nature and purpose of DuPont's conduct, and supported DuPont's action, by cutting their prices in a similar fashion. We now briefly consider whether (1) such conduct constitutes the formation of a conspiracy in restraint of trade under Section One of the Sherman Antitrust Act, 15 U.S.C., and (2) whether, as plaintiff earnestly contents, it also constitutes a price-fixing conspiracy violative of the law on a *per se* basis.

B. *The Action Referred to is a Conspiracy for Purposes of the Sherman Act.*

The pattern of conduct alluded to above, which was demonstrated in plaintiff's evidence, and was accepted by the jury by reason of the first finding of their special verdict, constitutes an actionable conspiracy under Section One of the Sherman Act. What is required for such a conspiracy is, simply stated, that there be the interrelated conduct of two or more persons having a consensus to act together to achieve an improper objective. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, *reh. den.,* 340 U.S. 939 (1951); *Interstate Cement v. United States,* 306 U.S. 2008 (1939); *United States v. Armour & Co.,* 137 F.2d 269 (10th Cir., 1943).

Although defendants urged in their motion for a directed verdict, as apparently they would now suggest, that plaintiff must show a specific express agreement in order to demonstrate an actionable conspiracy, the law is, in fact, clear that the agreement may be tacit or implied from conduct. *Theater Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Moore v. James H. Matthews & Co.*, 473 F.2d 328 (9th Cir., 1973). The acceptance by defendants, without previous agreement, of a plan to eliminate Daiflon from the market by persistent sales near or below defendants' costs of operation is sufficient to establish an unlawful conspiracy under §1 of the Sherman Act. *Interstate Cement, Inc. v. United States,* 306 U.S. 2008 (1939). As there stated:

> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators (citing authorities). Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." (306 U.S. at 227)

The teaching of such authorities as these is clear; At the time that defendants other than DuPont, knowing the nature and purpose of DuPont's downward price move, supported that price move, they formed an illegal conspiracy. To repeat, this commitment of other manufacturers, after DuPont had taken its action, is sufficient. There is no requirement that there have been a prior agreement within the industry. *Interstate Cement, supra; Wall Products Co. v. National Gypsum,* 326 F.Supp. 295 (N.D., Cal., 1971).

C. *A Price-Fixing Conspiracy is a per se Violation of the Sherman Act*

A price-fixing conspiracy is a *per se* Sherman Act violation. The cornerstone case commenting on the nature of *per se* antitrust violations generally is *Northern Pacific Railway Company v. United States,* 356 U.S. 1 (1958). As the Supreme Court there stated:

> "There are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal . . ." (356 U.S. at 5)

That price-fixing conspiracies are among the antitrust violations within the *per se* category, and are therefore presumed *as a matter of law* to be unreasonable and unlawful, is demonstrated by cases from the early years of the Sherman Act through the present. *United States v. Trenton Potteries Co.,* 273 U.S. 292 (1926); *United States v. McKesson & Robbins, Inc.,* 351 U.S. 305 (1956); *Albrecht v. Herald Co.,* 390 U.S. (1948). An example of the numerous declarations setting forth the *per se* nature of a price-fixing agreement is found in the following declaration from the *McKesson & Robbins* case:

> *"It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness since it is conclusively presumed to be unreasonable.* It makes no difference whether the motives of the participant are good or evil, whether the price fixing is accomplished by express contract or by some more subtle mean; whether the paricipants possess market control; whether the amount of interstate commerce affected is large or small; . . ." (351 U.S. at 309-09; emphasis added)

As suggested by this declaration, it is clear that the *per se* condemnation of pricing arrangements applies whether a specific price is particularly agreed upon, or, as here, what

is involved is a scheme to manipulate prices. In *United States v. Socony Vacuum Oil Co., Inc.,* 310 U.S. 150 (1940), the defendant oil companies had entered into a program which was not characterized by an agreement setting prices at a specific amount, but rather was a price stabilization scheme. The companies attempted to defend the program on the ground that the same constituted only indirect stabilizing of prices, and that it was done under an arrangement which had been adopted by the industry to counter sharp practices and poor economic conditions. The Court rejected all such contentions, saying:

> "[F]or over 40 years this court has consistently and without deviation adhered to the principle that price-fixing agreements are illegal *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate can be interposed as a defense." (310 U.S. at 218)

One of the authorities heavily relied upon by the defendants with respect to a portion of their attack on the individual monopolization or attempted monopolization facet of the plaintiff's case is Mr. Von Kalinowski. With respect to the illegal nature of price-fixing arrangements, Von Kalinowski, Volume 16H, *Antitrust Laws,* §65.06, emphasizes the *per se* nature of such antitrust violations saying that "although other antitrust *per se* rules may admit of some few narrow exceptions", such is not the situation with respect to the prohibition against price-fixing conspiracies since, as to these arrangements, the law "recognizes no exceptions" from the rule of *per se* condemnation. In *United States v. National Association of Real Estate Boards,* 339 U.S. 485 (1950), the Court discusses, as follows, the nature of the *per se* prohibition of price-fixing arrangements, saying:

> "Price fixing is *per se* an unlawful restraint of trade. It is not for the courts to determine whether in

particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action . . . is itself illegal under the Sherman Act . . ." (339 U.S. 489)

Clearly, the fact that the conspiracy was one to depress prices rather than to raise them is of no significance; a conspiracy to depress prices is also unlawful under §1 of the Sherman Act and is also a *per se* offense. *Albrecht v. Herald Co., supra; Cackling Acres, Inc. v. Olson Farms, Inc., supra.*

The significance of the applicability of the *per se* rule here is that, even if it were assumed, *arguendo,* that the various theoretical economic arguments advanced by defendants in their attack on the monopolization and attempted monopolization claim do have merit, (these are addressed subsequently and shown to be misconceived) the same still would not justify defendants' request that the Court overturn the jury's verdict. The very essence of the per se rule is that, once such a violation is shown to exist, economic arguments of the sort the defendants now advance are no defense. As stated in Volume II, C.C.H., Antitrust and Trade Regulation Reporter, §4600:

". . . it is said that price fixing by competitors is illegal per se under the Sherman Act. In practical application, this means that the practice cannot be justified under any circumstances."

D. *The Evidence of Record which Supports the Jury's Finding of a Conspiracy Exceeds that which is Required Under the Applicable Standard*

Plaintiff's evidence supporting the jury's finding that defendants conspired to exclude Daiflon from the industry by temporarily setting prices at an artificially low level is supported by evidence of record in various forms, including: documentary evidence of collusive communica-

tions among the defendants regarding pricing; testimonial evidence revealing collusion among the defendants on matters other than — but closely related to — pricing; evidence of extensive parallel behavior as to a number of business matters, including pricing; and the expert testimony of Dr. Joseph M. Jadlow. We now summarize plaintiff's evidence which shows that the jury's finding of a conspiracy to drive Daiflon from the market is well within the standards referred to above. Next, we discuss the defendants' attacks on the jury's conspiracy finding and show the attacks to be without merit.

1. Summary of the Evidence

A. The Documentary Evidence

It is, of course, rare that a government or private antitrust action is supportable by direct evidence of conspiratorial behavior. However, such is the situation in the present case. For example, Plaintiff's Exhibit No. 4552, is a Union Carbide field report issued approximately 40 days after the March, 1971, 13 percent price reduction shown by other evidence to have been initiated for the specific purpose of "countering" Daiflon. In the report, R. P. Lavach of Union Carbide reports on a "recent visit to Allied Chemican and discussions with Messrs. Noble and Conroy". The report shows that Lavach and Noble discussed Japanese imports of gas, and the question of whether Daiflon's emergence in the industry had yet caused "any shift in distribution patterns".

Another instance of a document constituting direct collusion among the defendants is Plaintiff's Exhibit No. 4134. This is a communication by a representative of Pennwalt which was prepared in 1969, the year that the plaintiff commenced its Galveston operations. Here Ward of Pennwalt is told by R. P. Howard of the same company that "Don Miller of DuPont recently told you that was a result of situations like Lennox".

Plaintiff's Exhibit No. 4506 is a document which shows collusive action among the defendants to establish the form of restrictive distribution systems which Daiflon alleges defendants created and perpetuated, and which, in turn, provided a main motivating factor for defendants' conduct in putting the plaintiff out of business. This communication, which corresponds with the date of the thirteen percent price reduction, makes specific reference to Daiflon and the "threat" which Daiflon was thought to pose to the industry.

> "The problem here as I see it is not the dollars but the fact that the importers could completely disrupt our distribution system which it has taken years to develop . . ." (emphasis added)

This memorandum sets for the essence of the litigation. Initially, over years of operation, the defendants "developed" the rigid and restrictive distribution system whereby the manufacturers sold to distributors and distributors resold to contractor-retailers. Daiflon threatened to disrupt the restrictive distribution pattern which, as shown by the memo in question, had been developed by defendants over a period of years. The "solution" ultimately adopted by defendants was to conspire a still further time, in order to place industry prices at a level at which it was known that Daiflon could not survive. In this regard, we have already discussed above some of the evidence which shows that the defendants engaged in extensive intelligence activities, a significant part of which was related to obtaining detailed information about Daiflon's operating costs, *supra*, pp. 14 to 15.

Finally, of great significance is Plaintiff's Exhibit No. 1042, a DuPont confidential memorandum from A. P. Dougherty, Jr., to D. H. George which is dated March 30, 1971, and constitutes, in part, an assessment of the reaction of other members of the industry to DuPont's

March 15, 1971, price reduction. The memorandum states, in part:

"Allied will meet us, as well as Raycon."

The memo adds:

"No word on Pennwalt as to their reaction to our discount arrangement."

The memo concludes:

"In summary, all territories except Dallas express overall endorsement of our program."

The above discussion refers only to some of the principal documents evidencing on their face collusive communications among the defendants. Many other documents of record also bear directly on the jury's finding of a conspiracy to drive Daiflon out of business since they reveal (a) industry-wide concern about Daiflon and the potential impact on the industry's sales and distribution practices, and (b) an industry-wide willingness — and, indeed, determination — to take the necessary action with regard to Daiflon. Many of these documents are discussed subsequently, infra, pp. 53 to 56, in connection with the discussion of defendants' collusive and individual monopolization. Such documents, however, are clearly relevant to the jury's determination as to conspiracy since (a) the determination of the conspiracy issue turns on the nature and purpose of the industry-wide price reductions in the spring of 1971 and 1972 and (b) these documents provide overwhelming support for the jury's finding that the reductions were directed against Daiflon rather than being solely the product of other economic forces in the industry.

B. Testimony of Dr. Jadlow

Dr. Joseph M. Jadlow is a Professor of Economics at Oklahoma State University and is thoroughly familiar with antitrust economics, having served, among other capacities, as a consultant for the Federal Trade Commis-

sion (Tr. 1152). Dr. Jadlow's testimony bore on the likelihood of a conspiracy among the defendants from several different respects. He addressed the issue from the standpoint of (1) whether the refrigerant gas industry is one whose organization, membership, and market share is suggestive of collusion, (2) whether the behavior of the refrigerant gas market is suggestive of collusion, (3) whether the likelihood of collusion in this industry is or is not consistent with plaintiff's evidence with respect to monopoly power, and (4) the historic practices of defendant DuPont.

Dr. Jadlow testified that a basic issue to be examined by an economist in determining the likelihood of the existence of a conspiratorial arrangement in an industry is the degree of concentration. This is true because highly concentrated industries are especially susceptible to collusive activity. Dr. Jadlow stated that, in determining whether an industry is a concentrated one, and therefore likely also to be collusive, economists employ what is called the "four firm concentration ratio". As Dr. Jadlow explained this test:

> "In other words, (you) look at the four largest firms in a market, you see what percent of the sales in that market these four firms account for.
>
> "Now, as a kind of benchmark, the all manufacturing average four firm concentrate in ratio has tended to be about 39% . .
>
> "So, if we find four-firm market concentration gets very far above 39%, we would tend to conclude that that's a very good chance that there is high monopoly power in that market." (Tr. 1159-60)

In the present case, the evidence of record was undisputed that DuPont itself had a market share greater than the 39% figure referred to by Dr. Jadlow, and that, in the refrigerant gas industry, the "concentration ratio" of the four largest firms would actually exceed ninety percent.

Obviously, therefore, any basis in the record to pro-

vide a relationship between very high market concentration and collusion provides, in and of itself, a significant degree of support for the jury's specific finding of a conspiracy. It is highly significant, therefore, that Dr. Jadlow's testimony discussed this relationship, and further pointed out that a specific economic study had supported the proposition that collusive arrangement are normally found in an industry having precisely the characteristics of the non-automotive aftermarket for refrigerant gas.

> "A . . . possible pricing strategy that could be an important one is what we might call predatory credible threat pricing or exclusionary pricing."
>
> "This, in a sense, is a combination of some or all of the other three policies that we mentioned. It might start out, for example, with a firm with monopoly power charging a short-run profit maximizing price or a group of firms through price-fixing charging the profit maximizing price, and then an entry may occur and they stand by the higher profits. And, after entry has occurred, the established firm or firms may cut their price down to below the cost of a new entrant, drive the entrant out of business, and then raise their price back up to the profit maximizing level.
>
> *"So, they have a temporary price cut just to get rid of a new competition, then they go back to the profit maximizing level."*

To state the point mildly, the jury's finding that there, in fact, existed a collusive arrangement within the non-automotive aftermarket for refrigerant gas, pursuant to which Daiflon was expelled therefrom, may reflect the jury's acceptance of Dr. Jadlow's testimony. This is especially true because of the strong similarity between the relevant economic theory, as explained by Dr. Jadlow, and the background of the industry, including (a) the

history of price levels in the refrigerant gas industry, (b) the history of parallel pricing activities as the price of refrigerant gas rose, (c) the dramatic across-the-board price cut by industry members in 1971 in face of growing concern about Daiflon, (d) the second price reduction which occurred in the spring of 1972, and (e) the immediate increase of prices to the highest level authorized by the then existing price controls, immediately upon Daiflon's departure from the industry.

C. Evidence of parallel conduct

Conspiracy need not be proved by direct evidence and may be inferred on the basis of various forms of indirect evidence. *United States v. Columbia Steel Co.,* 334 U.S. 495 (1948); *American Tobacco Co. v. United States,* 329 U.S. 781 (1946); *United States v. Masonite Corporation,* 316 U.S. 265 (1942); *Eastern States Retail Lumber Dealers Association v. United States,* 234 U.S. 600 (1914). The classic statement as to the right of the trier of fact to infer the existence of an understanding from indirect evidence was set forth by the Supreme Court over sixty years ago. In *Eastern States Retail Lumber Dealers Association, supra,* it was stated:

> "But it is said that in order to show a combination or conspiracy within the Sherman Act, some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done . . ." (34 S.Ct. at 934)

Of course, a highly significant form of indirect evidence of collusion is proof that the defendants engaged in on-going similar or parallel behavior. Daiflon has never contended that it could prevail under the Section 1, Sherman Act, claim on the basis of proof standing alone that the defendants engaged in parallel conduct. However,

while not in itself a violation, parallel conduct is a proper basis for the trier of fact to conclude, as the jury did here, that a conspiracy did, in fact, exist. *Cackling Acres, Inc., et al. v. Olson Farms, Inc.,* 541 F.2d 242 (10th Cir., 1976) and cases cited therein; *United States v. General Motors Corporation,* 284 U.S. 127 (1966). As stated by the Court of Appeals for the Tenth Circuit in its *Olson Farms* case:

> "We agree that price parallelism, standing alone, does not necessarily prove a conspiracy to fix prices (citing authority). However, the fact that price parallelism exists becomes a significant factor and may help to support a finding of conspiracy . . . A conspiracy must be judged on its constituent parts and *the jury must look at the alleged conspiracy in its totality. A conspiracy may be implied from a course of conduct and other circumstantial evidence."* (241 F.2d at 245; emphasis added)

A factor which lends particular significance to parallel conduct also exists if the parallelism occurs against a background of contacts among the defendants so that the circumstances demonstrate an *opportunity* for collusion. See, e.g., *Michaelman v. Clark-Schwebel Fiberglass Corporation,* 1975-2 Tr. Cases, paragraph 60, 550 (S.D., N.Y., 1975).

When the parallel conduct is not limited to one facet of the parties' business operations but is widespread and encompasses several elements of behavior, such is especially persuasive evidence of an express or tacit agreement. *Report of the Attorney General's National Committee to Study the Antitrust Laws,* p. 39. Moreover, parallelism as to pricing alone takes on added importance and persuasiveness when it exists in the context of both upward and downward price trends within a given industry. Oppenheim and Weston, *Federal Antitrust Laws,* West, 1968, citing *D. B. Cole, et al. v. Hughes Tool Co.,* 215

F.2d 924 (10th Cir., 1954), *cert. den.*, 348 U.S. 927, *reh. den.*, 348 U.S. 965.

A listing of the types of defendants' identical parallel behavior is impressive, indeed, when viewed against the background of these authorities. The elements of parallelism in defendants' conduct as revealed by Daiflon's evidence include:

> All members of the industry have consistently followed the practice of channelling their sales of refrigerant gas only through "full line" air-conditioning and refrigeration wholesalers, most of whom are members of the Air Conditioning and Refrigeration Wholesalers Association.
>
> The consistent on-going *refusal* of the defendants to sell refrigerant to end users.
>
> Parallel conduct by defendants with respect to monitoring and policing the distribution of containers in order to inhibit the practice of refilling containers.
>
> Undertaking various acts and practices to preclude "unauthorized" vendors from selling refrigerant gas directly to consumers.
>
> Parallel busines behavior in terms of the efforts of the defendants to induce the wholesalers to utilize the defendants' price concessions to reduce prices at the level at which Daiflon was attempting to compete.
>
> Parallel pricing behavior, including parallel pricing both during those periods when the industry price was rising, and after Daiflon's entry into the market, when the prices were characterized by a dramatic downward trend.

Of course, parallel behavior is also especially suggestive of collusion if it occurs against a factual background suggestive of the existence of a motive and an opportunity for a conspiracy, the extensive evidence in these matters being discussed herein.

One of the most remarkable facets of the defendants' brief is their attempt (Brief, p. *4)* to suggest that it was the "unanimous conclusion" of all the economists who testified in the case that parallel business behavior by the defendants could not be indicative of collusion in the circumstances of the present case, *viz.*, an oligopolistic industry consisting of a homogeneous product. Defendants' assertion is remarkable because Dr. Jadlow specifically addressed the matter of conscious parallelism, and the question of whether, in the context in which it occurred in the present case, the parallelism was likely to be indicative of collusion. (Tr. pp. 1168-1170) In so doing, Dr. Jadlow pointed out that, to evaluate the significance of parallelism, one must look at the context of the parties' conduct and,

> ". . . try to evaluate whether these seem likely to happen through independent decision making by the individual firms." (TR. p. 1169)

Then, following the approach thus suggested, Dr. Jadlow further explained:

> "For example, if you find a situation where, say, the costs of the firms in the market are all known to be going up, and maybe demand is also going up for the products of the firms, if these firms all lower prices in unison, that would make us suspicious.
>
> "That would not seem to be the economically rational thing for the individual firms to do through independent decision making.
>
> *"It would make us wonder if there was some price fixing going on, and with some possible ulterior motive, such as possibly to eliminate some rival competitor, some small entrant, maybe . . ."* (Tr. pp. 1169-1170; emphasis added)

The proposition that conduct contrary to normal, reasonably anticipated business behavior further increases the persuasiveness of parallelism has similarly been

recognized and articulated by the courts. See, e.g., *United States v. Eli Lilly & Co.*, (1969), Tr. Cases, paragraph 69, 411 (D.C., N.J., 1959).

An argument identical to defendants' attempt to suggest that parallelism cannot be significant evidence of collusion where, as here, the industry setting in which the practice occurs is that of a homogeneous product was addressed by the Court of Appeals for the Tenth Circuit. In *Morton Salt Co. v. United States,* 235 F.2d 573 (10th Cir., 1956), where an appellate court addressed an identical contention in the context of an antitrust case involving salt, the Court pointed out that parallelism is not always necessarily itself conclusive evidence of a conspiracy.

> "But . . . such behavior is another item to be weighed, and generally to be weighed heavily in the determination. The Intermountain Market in salt is served by only a few suppliers, an oligopoly in economic terms and the product is a standardized one . . . In such a situation, it is almost inevitable that the pricing policies of one company will be influenced and to some perhaps, detracts from the weight we should give to parallel pricing. But the presence of only a few friendly sellers and the stable demand for the product presents a great opportunity and temptation to combine . . ." (235 F.2d 477)

Then, weighing the inherent persuasiveness of parallelism and its significance in the setting of the salt industry, the Court concluded that, on balance, there was a basis to believe that the parallelism was not merely a product of happenstance or economic force, but indicated actionable collusion. Thus, the Court declared:

> "The compelling inference from the evidence already recited above would indicate that the instant case presents more than an example of conscious parallel business behavior."

D. Testimony of Harold David Gresham

The testimony of Mr. Gresham which has been referred to above is highly significant and is fully supportive of the jury's finding that defendants entered into a conspiracy to manipulate the prices in the non-automotive aftermarket for refrigerant gas in order to drive Daiflon therefrom. This is true in both of two respects: First, as far as defendants even address the jury's finding of a conspiracy, their primary attack on this finding is in the contention, advanced in various forms, that the record shows "undisputedly" not collusive behavior, but vigorous price competition, the sort of which is antithetical to collusion. Second, the Gresham testimony is significant, also, because it reveals, most specifically, collusive conduct among defendants of a price-oriented nature, and the courts recognize that collusive conduct, in one respect, may be highly persuasive evidence that the collusion extended to a different facet of the defendants' business practices. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Panotex Pipe Line Co. v. Phillips Petroleum Co.*, 457 F.2d 1279 (5th Cir., 1972), *cert. den.*, 409 U.S. 845. Accordingly, although Daiflon has not premised its case on the proposition that it was damaged by reason of a conspiracy among the defendants to alloate markets, evidence of such a conspiracy is persuasive to show the likelihood of collusion to engage in the exclusionary or "credible threat" pricing to which Dr. Jadlow referred.

As noted above, Mr. Gresham was formerly employed as a salesman for the defendant Kaiser (Tr. 7) and in this capacity had responsibility for the business operations of the company in several cities, including Houston, Corpus Christi, San Antonio, Beaumont, and Port Arthur, Texas, and Lake Charles, Louisiana (Tr. 7). Mr. Gresham worked for a short period with the salesman whom he subsequently replaced, a Mr. Sharp, and had fre-

quent contacts with Kaiser's refrigerant sales manager, Frank Rose, (Tr. 8,16). Mr. Gresham's testimony dealt with the "training" which he received from Kaiser's existing sales representative, Mr. Sharp, and his dealings with Mr. Rose, with respect to the matter of selling practices in the markets which Mr. Gresham covered. Mr. Gresham referred to a customer "Standard Brass" which operated outlets in several cities in Texas. In so doing, he described an arrangement whereby Kaiser was to supply an outlet of Standard Brass in one community (Port Arthur) while recognizing that other Standard Brass outlets were deemed by the members of the industry to be the "exclusive property" of other manufacturers. In this regard, Mr. Gresham was examined as follows:

Q. What, if any, understanding did you have through conversations with Mike (Sharp)?

A. Well, again, that store was selling DuPont and Allied.

Q. With respect to other allocations of business, would you state what, if any, conversations you had with Mike Sharp in connection with allocations?

A. Well, our understanding with Mike Sharp is that — as explained to me — that we would get the business in Port Arthur and the other various larger companies —

Q. With what other company in Port Arthur?

A. The Standard Brass outlet in Port Arthur, and the other larger companies had the other stores, and this is what was allotted.

Q. And what was your allotment?

A. About every fourth truckload.

Q. And how were the other three truckloads divided, if you recall?

A. I understand that DuPont got about two to one of the various other companies." (Tr. 15)

Mr. Gresham also testified about similar information received directly from Mr. Rose, during a week's "indoctrination period" in Dallas which he spent under the tutelage of Mr. Rose. Mr. Gresham testified at length concerning "training" and "instruction" about the sales practices which defendants now attempt to characterize as unfettered "vigorous competition", and the inclusion of a substantial amount of this testimony would further lengthen the brief. However, the following declarations are sufficient to indicate the tenor of Mr. Gresham's overall testimony with respect to "competition", as he knew it, in the industry:

> Q. And would you state what occurred during that week with Mr. Rose?
>
> A. Well, we went through the product manual and then through the customer files, as to who we were selling, and customers to call on and who we were to solicit from, and spend our time with. And it was basically a recap of what Mike Sharp had done.
>
> Q. Well, just state, as best you can recall, in substance what Mr. Rose stated to you at that time?
>
> A. Well, in substance, as I understood Frank Rose, that Kaiser was a smaller manufacturer of gas, and we were allotted a percentage of the market, and that the various customers had been established and we were to work with these customers." (Tr. pp. 15 to 16)

Mr. Gresham testified further about the pricing practices which Kaiser and the manufacturers employed with regard to their sales "efforts". In one instance, Mr. Gresham described communications with Frank Rose about a competitive situation which he had encountered where Gresham believed he could successfully obtain an account by meeting the price offering of a manufacturer-

competitor. Mr. Gresham furnished the following testimony:

Q. What do you mean, a competitive account?

A. Well, we had to match a price. I turned in the information of what the competition was selling for and what we had to do.

Q. What did you tell him, just report what you told him.

A. I went and gave them a price. I called Frank, told him what the situation — what we had to do to meet competition to get some business. He said, 'We cannot meet competition in that situation', that we would gain no business from them.

Q. Did he explain why?

A. He didn't have to, I knew why . . . [I]n my understanding, in essence what they told me was that we had a certain percentage of the market, and if we tried to get more than that percentage, that we would suffer the consequences . . . (Tr. p. 49)

In response to questions as to which companies he had been told would take retaliatory action, should Kaiser actually engage in vigorous price competition, Mr. Gresham identified DuPont and Allied. He was then examined as follows:

Q. Was there any unusual phrase that was used with respect to competing with these people that you recall?

A. In our industry, DuPont was the largest company and we had a little saying, we said, 'don't kick the giant in the shins'.

Q. Was this ever stated to you by anyone at —

A. Yes, by Frank Rose and Mike Sharp, and all of the salesmen used this phrase." (Tr. p. 48)

Mr. Gresham's testimony and other evidence as to the

behavior of the defendants before and after Daiflon left the market thus "dovetails" remarkably with the testimony of Dr. Jadlow. To return again to his testimony, Dr. Jadlow described a pattern of conduct, identical to that suggested by other evidence of record, as a likely and, indeed, predictable form of behavior from firms comprising an industry so anticompetitive in structure as the refrigerant gas industry. Thus, Dr. Jadlow testified:

> "A third possible strategy would be collusion. Even a firm with monopoly power might practice collusion because, as I said before, if it charges a high price, its competitors might undercut it in price and take some of its market share, so it would — it might possibly practice price-fixing with these other firms. They all keep their prices at the monopoly level, and in this way, they all maintain about the same market shares that they started out with, and they don't change these market shares . . . and then an entry may occur and they stand by the high profits, and after entry has occurred, the established firm or firms may cut their price down to below the cost of a new entrant, drive the new entrant out of business, and then raise their price back up to the profit maximizing level." (Tr. 116-67)

In their discussion (Brief, pp. 41-42) of plaintiff's contentions with respect to the restrictive distribution patterns existent in the refrigerant gas industry, defendants also utilize the tactic of defining conspiracy (expressly or by implication) as requiring a showing of a specific agreement among the parties. Purporting to find no express agreement with respect to refusals to deal or allocate business, defendants contend (Brief, p. 41) that the allocation of customers and business was not of the type prescribed by the antitrust laws, and that the refusal to deal with the non-full-line wholesalers was, by definition,

a legitimate exercise of the right of a businessman to select his customers.

With respect to the manufacturers' consistent and ongoing refusal to deal with non-"full-line" wholesalers, it has never been Daiflon's contention that the mere unilateral action of one or more defendants to decline to deal with a specific wholesaler for a legitimate business reason (e.g., credit) would constitute an antitrust violation. However, it does not follow from this that, as asserted by the defendants, that defendants' action is *ipso facto* legal. First, it is basic and fundamental antitrust law that, while a truly unilateral refusal to deal may sometimes be lawful, refusals to deal are never lawful, and indeed become *per se* illegal conspiracies to boycott, if they are accomplished collusively. Most significantly, however, it is also fundamental antitrust law that, notwithstanding the abstract right of businessman to select their customers for legitimate business reasons, such conduct also becomes unlawful when it has as its real objective a monopolistic or market control purpose. *Adolph Coors v. Federal Trade Commission,* 497 F.2d 1178 (10th Cir., 1974), *cert. den.,* 419 U.S. 105 (1975); *Colorado Pipe and Supply Co. v. Febco, Inc.,* 472 F.2d 637 (10th Cir., 1973), *cert. den.,* 411 U.S. 987 (1973).

Again, however, defendants' discussion of the absence of specific evidence of an agreement to refuse to deal, or to allocate customers, appears to be a tactical maneuver designed to draw the Court's attention away from the real issue. As suggested by plaintiff during the trial, the significance of the refusals to deal, and the adoption of restrictive distribution patterns, is not that they necessarily demonstrate in and of themselves conspiratorial conduct, but rather that the system thus created lends character and understanding to plaintiff's other evidence of collusive conduct to exclude Daiflon from the industry. Specifically, even assuming, *arguendo,* that

defendants' parallel behavior in refusing to deal with the non-full-line wholesalers was indeed solely unilateral, such conduct of the defendants is still highly significant in the context in which Daiflon actually offered the evidence, *viz.*, a showing that the manufacturers had — or thought they had — a motive to engage in predatory conduct toward Daiflon.

With respect to the defendants' suggestion (N.O.V. Brief, p. 41, n. 12) that Mr. Gresham's testimony is of little or no significance because market allocation is not shown in the antitrust sense, such contention is subject to the same misconceptions as have characterized other arguments of defendants. Initially, it is clear from a comparison of the testimony of Mr. Gresham above, with the portion referred to in defendants' footnote 12, that, when he subsequently eschewed testimony with respect to an "agreement" among the manufacturers, Mr. Gresham had been led in cross-examination to use agreement in the context defendants had invited, *viz.*, a specific expressed contract. Under the correct legal standard, and especially taking account of the standards by which a motion for a judgment N.O.V. us evaluated, the jury was clearly entitled to determined that there was indeed a common commitment among the defendants to allocate business. Beyond this, however, the testimony of Mr. Gresham was significant, and entirely proper for the jury's consideration, since, at the minimum, it is in fundamental contradiction of defendants' essential position that all the evidence revealed tht conduct within the industry, including the predatory price reduction, was necessarily the product solely of an wholly unfettered and vigorously competitive industry.

2. Defendants' Attack on the Jury's Finding of Conspiracy

We have alluded above to the fact that defendants'

brief in support of their motion for a judgment N.O.V. (a) clearly and flagrantly violates the standards applicable to motions for a judgment N.O.V. and (b) is permeated with false declarations and misrepresentations as to the record. Perhaps nowhere is this more clear than in defendants' discussion (Brief, pp. 31 to 44) of their contention that there is no evidentiary support for the jury's finding as to the nature of the industry's actions. Defendants contend that there is no evidence in support of the jury's finding that the price reductions were a collusive industry reaction to a threat Daiflon posed to the carefully established industry pricing and distribution patterns. Rather, they said it was shown by all the evidence to have been a non-collusive reaction of the defendant companies to other vague and ill-defined business conditions existing in the refrigerant industry. Without exaggeration, upon examination, this contention is ludicrous.

A main thrust of defendants' present attack on the finding of a conspiracy is the attempt (Brief, pp. 32-33) (a) to suggest, without so stating, that a conspiracy would exist if and only if there were a specific before-the-fact agreement to cut prices to expel Daiflon from the industry and (b) to further suggest that because — apparently contrary to normal practice — DuPont kept its pricing plans secret before the March, 1971, price moves, the same absolutely and conclusively disproves any possible conspiracy theory. Legally, and as a matter of common logic, defendants' argument is fallacious.

First, clarifying the applicable legal standard, there is no requirement that plaintiff show an *advance* agreement among the defendants to cut prices. A conspiracy in violation of §1, and indeed constituting a *per se* violation, is formed if, after DuPont's March, 1971, price reduction, the other defendants, knowing the nature and purpose of it, lent their support thereto. *Interstate Cement v. United States,* 306 U.S. 108 (1939); *Wall Products Co. v. Na-*

tional Gypsum, 326 F.Supp. 295 (N.D., Cal., 1971). As the Supreme Court responded to an identical argument in the *Interstate Circuit* case, wherein defendants contended that there could be no §1 Sherman Act violation because there was no proof of a before-the-fact conspiracy:

> "It was enough that, knowing that concerted action was contemplated and invited, the [defendants] gave their adherence to the scheme and participated in it . . . It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators." (306 U.S. 226-27)

As further pointed out by the Supreme Court in *United States v. Singer Mfg. Co.,* 374 U.S. 174 (1962), which is quoted in *Wall Products Co., supra:*

> "Whether the conspiracy was achieved by agreement, by tacit understanding, or by 'acquiescence' . . . coupled with assistance in effectuating its purpose is immaterial." (374 U.S. at 193)

It was by no means unreasonable for the jury to conclude, on the basis of the record, that DuPont's lowering of its prices did have a predatory motivation and that other members of the industry recognized this and were thereby invited to lend their support to DuPont's effort by, likewise, reducing prices to a level at which the plaintiff could not survive.

Two additional arguments of the defendants can also be addressed on the basis of the correct statement of the law of conspiracy, as set forth above. First, defendants' argument as to the ostensible absence of a before-the-fact price reduction agreement (N.O.V. Brief, 33-35) is a mere smoke screen. Even conceding, *arguendo,* that the evidence did, in fact, fail to show simultaneous or before-the-fact communications among the defendants, (direct evidence of such communications is discussed above) such fails to address the conspiracy theory which Daiflon

actually advanced. Second, defendants' argument as to DuPont's "elaborate efforts" to avoid before-the-fact communications of its intent to implement the March, 1971, price reductions also misses the mark. Defendants' argument places DuPont in this interesting dilemma. If it was DuPont's normal practice to carefully safeguard its intent with respect to anticipated price changes, the fact that it also did so (assuming, *arguendo,* such to be a fact) on this occasion is irrelevant. On the other hand, if such secretive measures were not DuPont's normal practice, one wonders what made the March, 1971, price reduction "special".

It would not have been irrational for the jury to have had such questions, and to have concluded that DuPont indeed anticipated the consequences of their drastic price reduction and, on this occasion, took special pains to avoid industry communications concerning its intent, still knowing full well that achievement of the hoped-for result of its conduct did not require any advance communications.

It follows, also, that, when defendants argue (N.O.V. Brief, p. 35) that the price moves were not entirely simultaneous, they do not help themselves in the least. The fact that a short period of time may have elapsed before each of the other defendants followed DuPont's lead is entirely consistent with Daiflon's conspiracy contention. Certainly, the jury could properly infer that there may have existed a short time before each defendant understood why — in the face of industry-wide increased costs and a growing demand — DuPont had elected to implement the drastic 13% reduction. The fact that the other companies lent their support to the plan slightly later, after the nature and purpose was fully understood by them is of no assistance to the defendants. To repeat, the other companies' subsequent "acceptance" of the plan "is sufficient to establish an unlawful conspiracy under the Sher-

man Act." *Interstate Circuit, supra,* 306 U.S. at 227.

Defendants' argument (N.O.V. Brief, pp. 35-36) that no finding of collusion was warranted because, in the face of DuPont's drastic reduction, "the other defendants had little choice but to reduce their list price in response to DuPont's actions" (quoting Professor Hibdon) is interesting indeed. Such a declaration wholly contradicts DuPont's frequent denials that it had monopoly power in the industry since one essential definition of monopoly power is merely the ability to substantially influence the price level in the industry. (See discussion, *infra,* pp. ____ to ____.) However, acknowledging that the declaration may be factually correct does not help defendants, provided only that — as is abundantly clear — the jury was not wholly unwarranted in finding (a) that the price reduction was predatorily motivated and (b) the other defendants understood, or came to understand, the purpose of the price reduction. Indeed, if some of the defendants did enter into the scheme only as a matter of economic necessity because of DuPont's conduct, that fact is wholly immaterial to the conspiracy claim, because it is basic that it is no defense that one entered a conspriacy reluctantly, even in response to economic coercion. See, e.g., *Flintkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir., 1957).

Returning again to defendants' authority, Mr. Von Kalinowski, with respect to the conspiracy element of a §1 Sherman Act case:

> ". . . all that must be shown is that each party acted (1) with the intention that his acts have the consequences they did have, and (2) with the knowledge that at least one other party would act in conjunction with him." (Von Kalinowski, *supra,* Vol. 1B, §6.01 (3))

Defendants' argument as to the ostensible "failure" of plaintiff's proof of conspiracy also conveniently misconceives the applicable rule with respect to the burden

to come forward with evidence. Having shown a drastic industry-wide price reduction in the fact of rising costs and an expanding market, together with motive and opportunity for collusion, Daiflon had, most clearly, presented evidence from which the jury could — as it did — properly infer a conspiracy. At that point, the burden to come forward with believable evidence shifted to the defendants. As also stated by Mr. Von Kalinowski:

> ". . . if it can be shown that (1) a restraint of the type contemplated by Section 1 exists, and (2) there was some contact between the parties alleged to have conspired, *then unity of action can be inferred absent a showing of extenuating facts.*" (Von Kalinowski, Vol. 16, §16.01(3); emphasis added)

In the present case, the defendants might have attempted to meet the responsibility of showing "extenuating facts" by producing their executives responsible for the price reductions and endeavoring to show that there were, indeed, industry business considerations which mandated the drastic price reductions. (Of course, in the present context, had such a showing, in fact, been made, it would not save the defendants under the applicable standards for evaluating the jury's contrary finding in the present context.) However, rather than producing their own executives and thus subjecting them to cross-examination, they relied solely on the testimony of Professor Hibdon, the weakness of whose testimony generally is discussed above, and who also did not even purport to have had personal knowledge of the business considerations actually behind the drastic price reductions, and who, further, only reviewed a few select depositions provided to him by the defendants, the depositions of witnesses such as Gresham having been excluded. In a similar situation in the *Interstate Circuit* case, *supra,* the Supreme Court had under consideration a situation where the defendant companies, rather than producing as witnesses the high-level manage-

ment personnel responsible for the decisions in question, called instead only local managers whose knowledge of the situation was more remote and general. The Court addressed this situation as follows:

> "When the proof supported, as we think it did, the inference of [collusive action], the burden rested on appellants of going forward with the evidence to explain away or contradict it. They undertook to carry that burden by calling upon local managers of their distributors to testify that they had acted independently of the other distributors . . . *The failure under the circumstances, to call as witnesses those officers who . . . were in a position to know whether they had acted in pursuance of agreement, is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character.*" (306 U.S. at 225-226; emphasis added)

PROPOSITION IV

THERE IS A SOUND BASIS IN FACT AND LAW FOR THE JURY'S FINDINGS THAT DEFENDANTS CONSPIRED TO MONOPOLIZE THE NON-AUTOMOTIVE REFRIGERANT GAS AFTER-MARKET, THAT DEFENDANT, DUPONT, INDIVIDUALLY, ATTEMPTED TO MONOPOLIZE SUCH MARKET AND THAT DUPONT, IN FACT, ACTUALLY MONOPOLIZE SUCH MARKET

In that portion of their brief attacking plaintiff's causes of action under Section Two of the Sherman Act (N.O.V. Brief, pp. 531), defendants utilize the same approach employed in other portions of their brief. Most

fundamentally through implication and by the omission of basic legal principles, Defendants attempt to obfuscate the existence of plaintiff's three separate and distinct bases for recovery under Section Two. They do this by suggesting that the same legal standards apply in the attempt to monopolize cause of action as with respect to actual monopolization, by ignoring the jury's finding that they conspired to monopolize the non-automotive refrigerant gas aftermarket.

The conspiracy to monopolize cause of action will be discussed in more depth subsequently. Generally, however, the defendants' failure to attack, or indeed allude to, the finding of a conspiracy to monopolize is in-and-of-itself fatal to the defendants' attack on plaintiff's cause of action under Section Two. Since there was a proper legal and factual basis for the jury to find a conspiracy to exclude Daiflon from the industry, defendants' arguments pertaining to market shares and the geographic market become irrelevant. The balance of this portion of the brief deals first with general principles regarding Section Two of the Sherman Act and, thereafter, with plaintiff's attempted monopolization, actual monopolization, and conspiracy to monopolize claims individually.

A. *General*

In this context, it is helpful to re-examine the language of Section Two of the Sherman Act, 15 U.S.C., §2. It states:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony."

It follows from the fact that the statutory language is in the disjunctive that each of the three separately stated proscriptions are separate and independent offenses under the

statute. As stated in Von Kalinowski, *Federal Antitrust Laws*, §8.01:

> "By its express language (§2) establishes three *separate* offenses. They are
> (1) actual monopolization,
> (2) attempted monopolization, and
> (3) combination or conspiracy to monopolize."

Numerous decisions of the Federal courts, including the Supreme Court as well as our Court of Appeals, substantiate this proposition and demonstrate that the offenses enumerated are separate and independent. See, e.g., *United States v. Griffith*, 334 U.S. 100 (1948); *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir., 1961). It is plain that an antitrust plaintiff is entitled to combine in a single suit a cause of action predicated on each of the separate offenses enumerated in Section Two. *Continental Oil Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962); *American Tobacco Co. v. United States*, 328 U.S.781 (1946); *Perma Life Mufflers, Inc. v. International Parts Co.*, 392 U.S. 134 (1948).

B. Actual Monopolization by Defendant DuPont, Individually

Monopolization by a single defendant under Section Two requires that two elements be established: First, the possession of monopoly power; and, second, the purposeful acquisition or maintenance of the monopoly power. If the plaintiff succeeds in establishing these two elements, its Section Two cause of action is complete, there being no requirement that the plaintiff demonstrate that the acquisition or maintenance of the power was accomplished through conduct which is unlawful independently of Section Two. *American Tobacco Co. v.*

United States, supra. The two forms of deliberate exclusionary conduct which are most clearly demonstrated in the evidence regarding defendant DuPont are exclusionary pricing and disparagement.

1. Exclusionary Conduct

The dispositive question, in Daiflon's view, as to whether defendant DuPont engaged in deliberate exclusionary practices in relation to it is whether DuPont instituted pricing policies having as their objective the sacrificing of normal profits in the immediate or the short run in order to be able to maximize profits in the long run, after Daiflon had been excluded from the market. Since DuPont did initiate the price reduction in March, 1971, the basis questions raised are simply (1) whether the jury could rationally find that the DuPont price reductions were, in fact, related to a predatory disposition toward Daiflon, and (2) whether the utilization of such prices by DuPont, including those after the subsequent reduction of 1972, constituted a deliberate program of sacrificing profitability to achieve higher monopolistic prices in the long run. In this regard, much of the evidence, discussed above, demonstrating an industry awareness of Daiflon's emergence as a competitor, together with a willingness to undertake action with respect to it, is directly in point. There are, however, numerous additional items of direct evidence bearing upon the purpose and significance of the price reduction.

Numerous documents of various forms provide a foundation for the jury's determination that DuPont did, indeed, engage in the conduct Daiflon alleged. Indicative of the sort of attitude which apparently permeated the non-automotive refrigerant gas aftermarket and provided the background against which the price reduction occurred is Plaintiff's Exhibit No. 1005. This document is a letter of January 13, 1970, from Wittichen Supply Company of

Birmingham, Alabama, to a Mr. Ranson of DuPont, articulating Wittichen's concern about the emergence of Daiflon in the industry. This communication, over the signature of the Vice President and General Manager of the wholesaler, states in part:

> ". . . This is our problem and I am asking you to try to come up with an easy answer . . .
>
> * * *
>
> "MY PROBLEM — How am I going to tell my remaining customers about your price increase and make them think it is smart to trade with me when their competition is buying 'Daiflon' and quoting on the same jobs."

The letter is answered by Mr. Ranson by his letter of January 26, 1970, wherein he thanks the wholesaler "for taking the time to share your thoughts and concerns about the threat from the Japanese imported refrigerant, 'Daiflon'". The letter proceeds:

> "As a manufacturer of refrigerant, we, too, are very concerned over the recent, aggressive activities of those who are importing and distributing 'Daiflon'."

Mr. Ranson proceeds to raise questions about ostensible quality control problems associated with Daiflon and raises the specter of "liability suits for allegedly faulty products". He then proceeds:

> "Let me assure you that we will watch the situation very carefully and will be prepared to take appropriate action when it becomes necessary."

Virginia Chemicals, Inc., is a subsidiary of DuPont which, along with the DuPont sales force, is responsible for the distribution of DuPont refrigerants. Plaintiff's Exhibit No. 1062 is a letter memorandum dated after DuPont's price reduction, *viz.*, April 30, 1971, from one Luther Cox of Virginia Chemicals to DuPont's Manager of Field Distribution, Patrick V. O'Donnell. The letter reports on Daiflon's sales activity in the mid-Atlantic

region and revaluates the impact which the price reduction was said to have had in that section:

> "I believe that our new pricing policy will be of great help in combatting the threat of Daiflon."

A further after-the-fact document from DuPont's files revealing the character and purpose of DuPont's 1971 price reduction is Plaintiff's Exhibit No. 1065, a DuPont field report which is related in time to the above memorandum from Mr. Cox. The report refers to the Birmingham wholesaler mentioned above and states:

> "Mr. Gennett is causing quite a stir in the market in the Birmingham area. He is passing on the 13% discount which we offered in order to combat the Japanese refrigerant . . . However, he is causing quite a stir with Wittichen Supply Company as far as pricing goes. His main concern, however, is not his competition with Wittichen Supply Company but with the Japanese refrigerant."

The testimony by deposition of Robert Wright, Jr., Marketing Manager of Refrigerants for DuPont, also provides a basis on which the jury could properly have disbelieved defendants' assertions that the March, 1971, price reduction was motivated wholly by other considerations and that there was no concern about Daiflon's emergence in the industry. Among other points, Mr. Wright testified that, after DuPont became aware of Daiflon's sales activities, its management caused the Daiflon gas to be tested, apparently hoping to detect quality control matters in order to get some basis for disparaging comments concerning Daiflon (Wright Deposition, pp. 69-70). Mr. Wright also testified (Deposition, pp. 67-68) that DuPont investigated Daiflon's buying prices in the hope that information could be developed to support a charge of "dumping" against the plaintiff's supplier. Finally, with respect to the particular matter of the March, 1971, price reductions initiated by DuPont,

Mr. Wright was examined as to whether the recent history of the refrigerant industry revealed price reductions of the sort implemented in the period of the plaintiff's business operations. He answered, "Correct", to a question in which it was observed that there had not been past price reductions that were comparable to those during the Daiflon period (Deposition, p. 21).

To return again to the testimony of plaintiff's economists, Dr. Jadlow, he explained the concept of "exclusionary" or "credible threat" pricing as merely a situation in which "the firm foregoes some immediate profits" and:

> ". . . set[s] [its] price low enough so that a new firm comes in, it's not expected to be able to make a profit, and thus you discourage entry by new firms and you limit entry in this way."

Defendants' primary attack on the jury's finding that DuPont did employ such deliberately exclusionary tactics is found in the contention (N.O.V. Brief, pp. 24-27) that such conduct by DuPont is merely legally protected legitimate price competition. Thus, defendants assert, "there is no evidence whatsoever that, as a result of the March, 1971, price reduction, DuPont was selling its refrigerant gas below its fully allocated costs or its marginal or incremental costs" (N.O.V. Brief, p. 24). Again, it appears appropriate to suggest that this assertion is wrong, as a matter of fact, and that it misconceives the applicable legal principles. In his deposition (p. 178), Mr. Wright of DuPont confirmed specifically that, as a result of the two price reductions in question, DuPont was "having a sale below cost", as to at least some lines of refrigerant gas. Contrary to the suggestion in defendants' brief (N.O.V. Brief, p. 24), it would appear, therefore, that there was, indeed, a "basis for finding that DuPont was making other than a reasonable profit".

With respect to the legal aspect of defendants' argu-

ment, plaintiff has no quarrel whatsoever with defendants' proposition (N.O.V. Brief, pp. 25-26) that the main concern of the antitrust laws is protecting vigorous competition rather than concerning itself with the economic health of individual competitors. However, accepting this observation by no means legitimatizes the present situation wherein, under plaintiff's evidence reasonably believed by the jury, a company with a large percentage of the market set upon a course of conduct specifically designed to eliminate a new entrant having a small percentage of the market but being a strong pro-competitive force in the industry, and did so in order that prices could be returned to a monopolistic level after the "threat" of Daiflon was eliminated. What defendants conveniently overlook, therefore, is that the present case presents not an "either-or" situation, but rather one wherein protecting a new entrant attempting to exercise a pro-competitive influence is fully consistent with protecting competition.

When defendants suggest (N.O.V. Brief, pp. 26-27) that the Court of Appeals for the Tenth Circuit has articulated an inflexible rule protecting predatory pricing conduct unless sales are made below direct cost, they misstate the facts. It is indeed true that, in a limited number of instances, other courts have suggested such a rule. However, no such inflexible rule applies in this Circuit, and the weight of even expert commentary on the law is proceeding in the other direction.

The most significant and prestigious review of the antitrust laws in recent years is to be found in the *Report to the President and Attorney General of the National Commission for the Review of Antitrust Laws and Procedures,* January 22, 1979. This blue ribbon commission of leading antitrust attorneys and economists specifically addressed holdings of the sort to which the defendants refer and noted its "concern" that such holdings, if widely followed, would seriously diminish the proper application

of Section Two. Specifically addressed by the Commission is defendants' theory as to a strict cost-oriented rule concerning pricing:

> "The second area of the Commission's concern — the relevance of below marginal cost pricing — is based on the arguments, most visibly advanced by Professors Areda and Turner, that pricing at above marginal costs is necessarily economically efficient and thus pro-competitive . . . This standard is too restrictive, especially as it applies to conduct by a firm with a dominant market position, and the Commission recommends a more flexible analytical approach . . . [W]here there is other evidence of exclusionary or predatory intent, the fact that prices are above marginal costs should not absolutely bar a finding of liability. Rather, the relation of price to marginal cost should be considered in its context along with the separate evidence of intent and the defendants' market power. For example, where a firm with a dominant market position undertakes a pattern of pricing behavior directed at excluding new entrants from a market . . . liability may be found even if the prices charged were above marginal cost. . . . Similarly, when a firm undertakes a pattern of pricing behavior intended to 'police' competitors by discouraging price-cutting, liability may be found in spite of prices above marginal costs."

Although the Presidential Commission did indeed recognize that adoption of its views would change the holdings of certain courts, such is not the situation with regard to our appellate court, whose decisions evidence clearly acceptance of the realistic and flexible standards which the Commission urged. *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir., 1976); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir., 1962).

In the *Nisley* case, the Court commented upon the nature of Section Two of the Sherman Act in the context of an assessment of a trial court's instructions wherein the jury was directed that the significant issue was whether the defendant had exclusionary intent and acted on such intent to the detriment of the plaintiff. The Court declared:

> "We think the instructions in that regard correctly stated the law of the case, and we do not think it was reversibly erroneous to refuse to define 'attempt to monopolize' beyond the point of telling the jury that the attempt must be accompanied by a specific intent to acquire market power and exclude others from competition." (300 F.2d at 586)

In the more recent *Cacking Acres* case, the Court also dealt with a defendant's contention that there were arbitrary pricing standards or elements without which the plaintiff could not succeed; however, the Court gave only summary attention to such contentions, saying:

> "Viewing the evidence in its entirety, it is clear that reasonable minds could find a violation of Section Two based upon a course of conduct and other circumstances which tended to show Olson's domination in the Utah-Idaho egg market, its intent to control the egg producer paying price and therefore dominate the market and the predatory means used to accomplish this purpsoe." (541 F.2d at 246)

Telex v. I.B.M., 510 F.2d 894 (10th Cir., 1975), *cert. dis.*, 423 U.S. 802 (1976), (N.O.V. Brief, p. 26), on which defendants rely, sets forth a general proposition that a monopolization defendant should not be prohibited from adjusting price levels within "reasonable ranges". To state and accept that principle as a generality, however, fails to provide defendants any real assistance, because such generality has little or no applicability to the facts of the present case. Under the teaching of such decisions as

Cackling Acres, Inc. v. Olson Farms, supra, it is clear that the preliminary determination as to what is "reasonable" behavior for a dominant company will be determined on the basis of an assessment of the overall record in the case, rather than from some inflexible standard. Secondly, whatever the significance of the question of a "reasonable" price range in the abstract, in the present case, the jury was not unwarranted in finding that DuPont did not implement its "adjustments" within a "reasonable range", when, according to the testimony of its own manager, Mr. Wright, DuPont sold below cost.

Similarly, the Pacific Engineering and Production Co. v. Kerr-McGee Corp. case, 551 F.2d 790 (10th Cir., 1976), *cert. den.,* 434 U.S. 897 (1977), is of no help to the defendants, and, indeed, when properly examined, is virtually dispositive of the monopolization issue in plaintiff's favor. Initially, the Court was there called upon to review a determination by the trial court as to predatory or monopolistic behavior in the setting of an industry which had diminished to the point that only a single company could survive economically, wholly apart from any predatory practices. Accordingly, the situation there presented was one constituting or closely akin to the natural monopoly situation, in which many courts have recognized that it is not appropriate to apply normal standards respecting illegal monopolization. Further, in stark and significant contract to the present situation, however, the trial court there found the *absence* of any predatory pricing conduct by defendants. (551 F.2d at 795). Concomitantly, the court also found the presence of a legitimate, non-predatory motive for the defendant's price reductions in the form of persuasive economic data revealing that the defendant was thereby achieving economies of scale, this because, by the price reductions, the defendant was "expand[ing] output to reach a lower price on its marginal costs curve". (551 F.2d at 796). Finally, and

most importantly, whether correctly or not, the courts there found the absence of other, non-price, predatory conduct, creating a situation wherein (1) evidence had not been presented of sales below direct cost, and (2) there was a dearth of other evidence revealing predatory intent or disposition. Properly viewed, the most significant thing about the Pacific Engineering decision is that, fully consistent with the Cackling Acres and the Union Carbide v. Nisley cases cited above, the Court specifically rejected defendant's invitation to adopt an arbitrary, accounting-oriented standard as to the presence or absence of monopolistic behavior. Thus, the Court declared:

> "Although we do not intend to adopt a solely cost-based test, [here] there are no other relevant factors indicating that [the defendant's] conduct was anti-competitive. . . ." (551 F.2d at 797; emphasis added)

The fallacy of defendants' contentions with respect to the matter of individual monopolization by defendant Du-Pont — especially as it relates to pricing activity — is apparent upon nothing more than the application of common logic to legal principles set forth by defendants themselves. Defendants correctly defined monopolization (N.O.V. Brief, p. 5) as (1) the possession of monopoly power, and (2) its willful acquisition or maintenance. Here, Daiflon has alleged — with the jury's subsequent agreement — that defendants, including specifically Du-Pont, *did* exclude Daiflon from the non-automotive after-market for refrigerant gas, *inter alia,* by its pattern of pricing conduct. Pursuant to which, it (a) set about to and did ascertain plaintiff's product costs, knowing full well that Daiflon could not survive "price war" conditions, (b) deliberately pegged its own price levels at a level below Daiflon's costs, and (c) having achieved the desired objective of removing Daiflon from the industry, thereafter restored its prices to the maximum level then permissible.

Thus, correctly viewing the situation, it is fundamentally illogical for defendants to argue that DuPont has not thereby been guilty of deliberate exclusionary conduct for the reason asserted, simply because, recognizing that such was all that was required to achieve the intend result, DuPont only priced its product below its full costs and not below its direct costs (i.e., assuming, *arguendo,* that such was in fact the circumstances). This does not show — under defendants' own standards — that DuPont did not engage in deliberately exclusionary conduct. Indeed, all that is actually suggested by DuPont's argument is that it behaved as a "prudent" monopolist by avoiding expending more of its funds than was required to accomplish the intended objective. Indeed, again accepting the evidence, it might be argued that DuPont's actual conduct (assuming, *arguendo,* the absence of sales below direct costs) was more antithetical to the public welfare since the public derives some benefit (albeit very costly and short-term) from even a predatory price reduction. Thus, by its action in carefully limiting the reduction to the amount which would do the job, thus conserving its own resources, DuPont diminished even this artificial, short-term, public welfare economic benefit.

Defendants' other challenge to the jury's finding as to monopolization by DuPont consists of the argument (N.O.V. Brief, pp. 6-8) that the jury misconceived the relevant geographic market. Central to this contention is its characterization of the testimony of Dr. Jadlow (Brief, p. 6) whereby defendants apparently attempt to induce the Court to believe that plaintiff's economist defined the geographic market as a national non-automotive aftermarket for refrigerant gas. In reality, it is apparent even from the portions of Dr. Jadlow's testimony quoted by defendants that the question propounded was directed to the product market, and that Dr. Jadlow testified only that (as defendants now concede) the non-automotive

replacement market for refrigerant gas was a proper *product* market "throughout the United States". Accordingly, defendants' first attempt to alter the determination with respect to the geographic market fails by reason of the fact that it is premised on a misstatement of the record.

Consideration of the legal arguments pertaining to the correct definition of the geographic market requires examination of the nature and purpose for defining the market. As set forth in United States v. Grinnell Corporation, 384 U.S. 563 (1966), the essence of the "geographic market" inquiry is simply to ascertain the geographic region within which the defendants and plaintiff effectively competed. However, as set forth in *Grinnell,* the essence of the issue is simply to determine the factual "realities" as to the area of competition (384 U.S. 577).

It is fundamental antitrust law with which Daiflon has no quarrel whatsoever that, if it was indeed seeking to carve from the total applicable area of competition a smaller area within which the defendants' conduct was to be assessed, it would be incumbent upon Daiflon to demonstrate some practical or economic reason that it was inappropriate not to consider the entire area of economic confrontation between the parties. However, acceptance of such a truism of defendants does not, by any means, support the conclusion which they seek to draw from it. Here, treating the thirty-one specifically identified states in which Daiflon conducted business operations as the applicable geographic market requires no such development of a smaller "submarket". Further, the result suggested by Daiflon is consistent with the nature and purpose of the antitrust laws, whereas defendants' proposition clearly is not. If, in fact, the courts were required to focus on the total area in which the defendant operated rather than the area of effective competition, the result would be totally inconsistent with antitrust principles and objectives. The inevitable result of such a view would be that a localized

seller could be put out of busienss with impunity by a natural marketer, provided only that the defendant's position in the natural market was not dominant. Moreover, this would be true even though the defendant could accomplish his objective by reason of a dominant position in a regional market.

Again, it is appropriate to refer to the general priniciples recited above pertaining to a review of the jury's fact finding pursuant to a motion for judgment N.O.V. These standards, viewed in conjunction with further teachings of the recent case of *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir., 1974), demonstrate that the matter was properly handled by the Court and the jury, and the result should not now be interfered with.

The Court fully and properly instructed the jury on the matter of the relevant market, both product and geographic. In response to plaintiff's evidence and in conjunction with such proper instructions, the jury found that DuPont individually, and defendants generally, had been guilty of monopolization. Inherent in this finding under the Court's instructions was, of course, the conclusion that plaintiff's evidence set forth an appropriate geographic market. Accordingly, since the definition of the market is a fact issue, and plaintiff's evidence that the thirty-one states which its evidence identified were, in fact, those in which Daiflon operated, the basic principles mentioned above with respect to review of the jury's fact determinations on an N.O.V. motion are conclusive. In response to a similar dispute in the *Olson Farms* case, *supra,* the Court of Appeals observed that, "The trial court in effect submitted to the jury the question as to just what constituted the relevant geographical market", (541 F.2d at 245), and:

> "Under the facts of the case we find no error in the trial court's handling of the matter.

* * *

"The relevant geographic market is seldom fixed by meets and bounds. (citing cases) In the case at hand, there was a difference of opinion as to what constituted the relevant geographic market, and in such circumstances it is best left to the plaintiff to establish by a preponderance of the evidence the area in which anticompetitive conduct has its impact. It was clearly proper to submit the issue to the jury." (541 F.2d at 245-46)

Finally, defendants also challenge (N.O.V. Brief, pp. 9-11) the jury's findings (Special Verdict, Item 3) that DuPont had over 50% of the pertinent relevant market, and its further finding (Special Verdict, Item 5) that DuPont had monopoly power in such market during the 1969-72 time period. Defendants do this on the basis of a premise — which they nowhere state or support — that plaintiff can prove monopoly power only by showing the existence of a certain market share, and that that market share is other than 50%.

Initially, the fact is that market share is not the only basis on which an antitrust plaintiff may demonstrate the requisite "monopoly power" as indeed defendants themselves have apparently recognized (N.O.V. Brief, p. 9), "monopoly power is . . . 'the power to control prices'" and defendants themselves have concluded that DuPont had such power when they assert, in connection with the discussion of conspiracy, that once DuPont lowered its prices, the other members of the industry had no alternative but to accede to DuPont's power.

This definition of monopoly power currently adopted by defendants is, in fact, the one which plaintiff utilized and developed through the testimony of Dr. Jadlow. Defendants' own executives conceded, in deposition testimony, that, in the realities of the marketplace, defendant DuPont is the industry price leader and, in con-

junction with the tests articulated by Dr. Jadlow, that fact is, in-and-of-itself, sufficient to support the jury's finding of monopoly power. As stated by Dr. Jadlow:

> ". . . We might look to see if there is one firm that repeatedly has tended to be the price leader that other firms have followed in a market. If there is such a firm, there is a very good chance that that firm has monopoly power. That's why it's the price leader." (Tr. p. 1162)

Dr. Jadlow further explained (Tr. pp. 1158-59) that the fact determination of whether monopoly power exists in a given industry can be made on any of three bases, "market structure", "market conduct", and "market performance". Dr. Jadlow proceeded to explain that a strong indication of monopoly power would arise in an industry such as the refrigerant gas non-automotive aftermarket if it was shown that the firm in question "has over probably 40% of the market" (Tr. p. 1159).

Thus, properly viewing the question of monopoly power as a fact issue — and especially viewing that issue in conjunction with DuPont's present admission in its brief that once it elected to institute the March, 1971, price reduction, other industry members had no choice but to concur — it is apparent that the jury's fact determination that DuPont did possess monopoly power was, by no means, irrational.

Defendants' primary legal challenge to the jury's determination in this respect rests upon isolated decisions that, in the context of the industries there involved, a larger market share would be required to support a finding of monopoly power. However, defendants have failed to show that, in any of the cases relied upon, the plaintiff in fact put forth either of the other two standards for monopoly power, and certainly, there was no showing that, as here, the defendant in question conceded that it possessed the power to establish the price level in the

industry. As discussed above, all defendants, including DuPont, endorsed and supported the court's Special Verdict, including the one inquiring whether DuPont possessed a 50% share of the relevant market. If, indeed, defendants felt that the 50% standard was inappropriate in the fact of the present case, one wonders why they affirmatively supported the form of Verdict at the time the court posed it to the jury.

C. *Conspiracy to Monopolize Among the Defendants and Attempted Monopolization by Defendant DuPont*

We suggested above that the defendants' various vague and esoteric challenges to Daiflon's Section Two Sherman Act cause of action have the ring of a tactical maneuver, at best, in light of the facts that the issues on which defendants rely are not even presented by Daiflon's additional two theories for recovery under Section Two, *viz.*, attempted monopolization and conspiracy to monopolize, both of which the jury also found to be present. With respect to these matters, the law is clear.

Although defendants now attempt to challenge the monopolization finding on the theory that DuPont individually does not possess monopoly power within the relevant market, it is clear that, with respect to a conspiracy to monopolize claim, the relevant issue is not whether a single defendant possessed such power, but whether all parties to the combination, viewed together, could have possessed such power. *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2nd Cir., 1961). Further, in a conspiracy to monopolize cause of action, it is not necessary to define the relevant market. *Salco Corp. v. General Motors Corp.*, 517 F.2d 567 (10th Cir., 1975). Further, the principles discussed above concerning the nature and elements of a combination or conspiracy under Section One of the Sherman Act have

equal applicability to conspiracies to monopolize under Section Two. *American Tobacco Co. v. United States,* 328 U.S. 781 (1946).

Similarly, with respect to Daiflon's claim of attempted monopolization, which the jury also specifically concurred in, most, if not all, of defendants' present arguments are without merit, even if it were conceded, *arguendo,* that they otherwise had applicability to the actual monopolization claim. It is settled, beyond question, that, in attempted monopolization cases, a showing of monopoly power is not necessary, and the requirement is replaced by proof of specific intent to monopolize, which requirement the finder of fact may properly infer from the predatory conduct itself. See, e.g., United States v. Columbia Steel Co., 334 U.S. 445 (1948).

The jury correctly determined that Daiflon successfully established each of its three causes of action under Section Two, *viz.,* actual monopolization by DuPont, a conspiracy to monopolize, and attempted monopolization by DuPont.

PROPOSITION V

DEFENDANTS UNFAIRLY ATTEMPT TO LIMIT DAMAGE PROOF SOLELY TO THE TESTIMONY OF ITS EXPERT WITNESS, DR. BENTON GUP

Defendants have adopted an unsupportable approach to the question of damges, to-wit:

1. Daiflon should be limited in its damages to the fair market value of its business solely as calculated by Dr. Benton Gup;

2. Dr. Gup's testimony was insufficient, for a number of reasons, to prove the reasonable value of such losses (notwithstanding the special verdict); and

3. It was accordingly unnecessary for defend-

ants to present any testimony at trial with regard to the question of damages; although certain "damage" witnesses were originally listed.

With respect to the first element of defendants' contention, it is stated in their memorandum that:

"Going into trial, Daiflon had taken the position that its only damages are the fair market value of its allegedly destroyed business, as calculated by Dr. Benton Gup. This damage was set out in Plaintiff's Supplemental Response to Defendants' Third Set of Interrogatories, filed July, 1977." (Judgment n.o.v. Brief, p. 44).

Defendants thereafter refer to Dr. Gup's damage computations as "the exclusive basis of Daiflon's claim for damages." (*Id.*) This is the position defendants asserted throughout trial, and argued to the jury. As Daiflon will demonstrate, this proposition is totally inaccurate, and known to be so by defendants.

The operative complaint in this case is Daiflon's Second Amended Complaint which was filed of record March 5, 1973. Following a statement of the offenses charged in paragraphs 10 through 15 of the complaint, Daiflon states the injury suffered as follows:

"16. By reason of and as a direct and proximate result of the unlawful conduct alleged in paragraphs 10, 11, 12, 13, 14 and 15, plaintiff has been injured that:

(a) It has lost profits by reason of lost sales that it would have made in the absence of these violations.

(b) To the extent that it has been able to make sales, plaintiff has been obliged to sell at prices lower than it would have been able to charge under freely competitive conditions.

(c) It has suffered substantial injury to its good will as a result of defendants' violations.

17. As a direct and proximate result of the fore-

going violations, plaintiff's business has been irrevocably and completely destroyed and its value reduced from a value plaintiff conservatively estimates at $3,000,000.00 to approximately $150,000.00 representing a salvage value." (Second Amended Complaint, p. 5).

The Second Amended Complaint was filed on March 5, 1973. On December 13, 1976 defendants submitted to plaintiff their third set of interrogatories which specifically relate to plaintiff's claim of damages as set forth in paragraph 17 of the Second Amended Complaint. On January 28, 1977 plaintiff stated in answer to defendants' interrogatories that the sum of $3,000,000.00 was arrived at in June of 1972, prior to the filing of this action and represented the combined efforts of Daiflon's president, Richard E. Carter and Jerry Reed, one of the attorneys for Daiflon. Daiflon further identified, in its answer to Interrogatory No. 1(c), the specific documents which were utilized in making the estimate. The steps involved in computing the estimate were outlined for defendants in the answer to Interrogatory No. 1(d).

On March 3, 1977 counsel for Pennwalt wrote to Daiflon's counsel with respect to the answers provided to defendants' third set of interrogatories. (A copy of the letter is attached as Exhibit "A" to this Response). In that letter counsel acknowledges the act that Daiflon's damage theory includes elements *other* than the calculations of Dr. Gup:

* * *

"1. We need each of the numbers and each of the mathematical operations by which you get the $3 million bottom line.

2. If you are making assumptions or inferences (and there are obviously quite a few) we need to have more information about them. In this connection, it is obvious that you are putting a great deal

of reliance on the projected statement of income identified in answer to Interrogatory 1(c), and it is likely that Dick Carter is the principal source of the assumptions and inferences that went into that statement and perhaps into other aspects of your damage theory. Since at some point we will be resuming Carter's deposition, it will be O.K. if your supplementary answer merely states the assumptions and inferences *other* than those made by Carter (such as, for example, any made by Gup) and for each assumption or inference give us the identity of the person who made it and the justification for making it." (emphasis supplied)

* * *

The projected statement of income referred to by counsel for Pennwalt in his letter, and identified in Daiflon's answer to Interrogatory No. 1(c), was introduced at trial at Pl. Exh. No. 17. In July, 1977 Daiflon, pursuant to the requirements of Rule 26(b)(4) F.R.Civ.P., and in accordance with a prior stipulation of counsel, submitted a supplemental response to defendants' third set of interrogatories. There Daiflon indicated that it intended to call Dr. Gup as an expert witness at trial, and that the subject matter of his testimony would be "the going concern value of Daiflon, Inc. at the time it went out of business." (Supplemental Response to Defendants' Third Set of Interrogatories, p. 1). The supplemental response thereafter provided Dr. Gup's opinion with respect to the going concern value and outlines the procedure utilized by him in arriving at that value. Subsequently, on August 17, 1977 Daiflon, by agreement of counsel, filed its answer to Interrogatory No. 3(e) of defendants' third set of interrogatories. Again, the issue of plaintiff's lost profits was addressed:

"Since defendants' acts and practices successfully excluded plaintiff from the refrigerant gases industry,

they resulted in the loss complained of provided only that the plaintiff could otherwise have succeeded in continuing its business operations.

Plaintiff has also sustained damage by reason of the losses which it incurred as a result of the defendants' conduct *while plaintiff remained in business.*" (emphasis supplied) (Plaintiff's answer to Interrogatory No. 3(e) of Defendants' Third Set of Interrogatories, p. 2).

On October 19, 1977 counsel for Pennwalt again wrote to Daiflon's counsel in connection with the answer to defendants' third set of interrogatories. (A copy of that letter is attached to this Response as Exhibit "B"). The first item discussed in that letter is "Dr. Gup's *contribution* to your damage case." Thereafter, at page two of that letter counsel for Pennwalt acknowledges that he previously agreed that to the extent that Mr. Carter contributed information toward Daiflon's damage case, defendants did not deem plaintiff to be under an obligation to provide that information in a supplemental interrogatory "since we can ask about that on his deposition."

In view of Daiflon's complaint, defendants' third set of interrogatories, Daiflon's answers and supplemental answers to those interrogatories, and the recognition of defendants' counsel with respect to the fact that Daiflon's damage case involved in part Dr. Gup's testimony with respect to going concern value, defendants' belated contention that Dr. Gup's testimony formed the exclusive basis of Daiflon's claim of damages is not a credible assertion. Moreover, at trial Daiflon presented evidence through the testimony of Carter and McDonald in regard to plaintiff's lost profits and loss of investment, in addition to Mr. Carter's testimony regarding the value of Daiflon based upon capitalization and utilizing the projected statement of income. (Pl. Exh. No. 17).

PROPOSITION VI

THE SPECIAL FINDINGS OF THE JURY WITH RESPECT TO THE FACT OF DAMAGE TO DAIFLON AND THE AMOUNT OF SUCH DAMAGE SHOULD NOT BE DISTURBED

A. The Special Verdict of the Jury.

Of the ten special questions presented to the jury, four of the questions dealt specifically with the issues of the fact, causation and amount of Daiflon's damages. The jury determined that Daiflon's evidence with respect to the reasonable value of its business and property losses had been proven, and was not insufficient or too speculative. (Special Finding 9). The jury specially determined that the reasonable value of Daiflon's business and property losses amounted to $2,500,000.00. (Special Finding 10).

B. The Questions Presented.

The questions now presented relate to the validity of the jury's special findings within the perspective of the standards of Rules 50 and 59. While the matter of applicable principles is discussed in some detail at Proposition I and VIII of this Response, it is nevertheless appropriate at this juncture to first define the perspective within which defendants' motions relating to damages should be considered. The case of *Reed Brothers, Inc. v. Monsanto Company,* 525 F.2d 486 (8th Cir. 1975) has previously been discussed in Proposition I, *supra.* In that case Monsanto argued, with respect to the trial court's grant of the motion for judgment n.o.v., that the proof adduced in support of the damage claim was "wholly speculative." (*Id.* p. 499). The Court briefly reviewed the evidence presented by the plaintiff, noting that while plaintiff's calculations were not "absolute" they came within the principles set forth in prior judicial decisions e.g., *Arthur Murray, Inc. v. Reserve,* 406 F.2d 1138 (8th

Cir. 1969). In *Arthur Murray,* the Eighth Circuit relied upon the opinion of the Supreme Court in *Eastman Kodak Company of New York v. Southern Photo Materials Company,* 273 U.S. 359, 47 S.Ct. 400, 71 L. Ed. 684 (1927) where the Court stated:

> "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.' ***Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." 273 U.S. at 379, 47 S.Ct. at 405.

Accordingly, the *Monsanto* court held the evidence in that case was "sufficient to raise a question for the jury to determine." 526 F.2d at 499. That is the dispositive question.

The teaching of *Monsanto* is also helpful to defendants' motion for new trial since that motion relates to the special findings of the jury pertaining to damages. Justice Clark clearly states in *Monsanto* that where the defendant, in a motion for new trial, seeks a reappraisal of the evidence the trial judge must be sensitive not to interfere with the role of the jury as trier of fact. (*Id.*). That admonition is applicable here where defendants seek to present a motion for new trial, as well as the motion for judgment n.o.v., on the basis of bits and pieces of testimony and documentary evidence claimed to be supportive of defendants' position at trial.

C. Plaintiff's Damage Evidence.

Essentially, defendants' argument is an attack on the credibility of Dr. Gup, and the procedures which he util-

ized in arriving at his conclusions. This fits in well with defendants' overall strategy of seeking to limit the plaintiff solely to Dr. Gup's testimony as to damages, thereby having the court disregard all evidence presented by plaintiff's witnesses Richard E. Carter and Robert B. McDonald. This legal maneuver constitutes, for the reasons indicated in Proposition V, *supra.*, a gross mischaracterization of the facts relating to plaintiff's claim for damages.

Much is omitted from defendants' discussion of the testimony of Messrs. Carter and McDonald with respect to damages. Mr. Carter testified that in 1970 Daiflon, Inc. merged with Carter Supply Company (an air conditioning and refrigeration wholesaler) and named the resulting corporation Daiflon, Inc. (Carter, Tr. 102). Carter, McDonald and Adams owned the stock of Daiflon. (*Id.*) Carter testified that in 1970 the company reported a profit of $58,000.00. (At that time the company operated as a air conditioning and heating wholesaler as well as a seller of refrigerant gas.) (Carter, Tr. pp. 102-103). He testified that Daiflon's move to Galveston eliminated the difficulties experienced in 1969 and 1970 regarding the receipt of gas.[9] (Carter Tr. p. 103).

Daiflon's sales continued to increase during the year 1970 and into the year 1971. (*Id.* p. 105). However, in June of 1971 sales declined dramatically following the defendants' 13% across the board price decrease. (Carter, Tr. pp. 105-111).

Mr. Carter identified a Projected Statement of Income for the period March 1, 1971 to February 28,

---

[9]Mr. Carter further testified that in the operation of Daiflon he employed practices similar to those employed when he operated Carter Supply Company successfully. (*Id.* p. 115).

1972[10] (Carter Tr. p. 198). In that projection he took into consideration the selling expense which he anticipated, the freight, automobile expense, entertainment expense and even postage and the expense of printed matter. (*Id.* p. 201) Payroll taxes were computed and applied. (*Id.*) Additionally, Mr. Carter took into consideration, in determining his direct costs, such items as importer fees, customs, duties and general and administrative expense. (*Id.* p. 202). He computed the expense of utilities, insurance, interest and a bad debt reserve. (*Id.* p. 202) Additionally, consideration was given to bank service charges and legal and accounting fees. (*Id.*) In summary, he determined a figure of net income before taxes at $200,897.12. (His projection reflected a figure of net income before tax of 10%). (*Id.* p. 204).

With respect to the value of Daiflon, the following testimony was adduced from Mr. Carter upon cross-examination:

"Q. Based upon those projections, did you arrive with a projected figure as to the value of Daiflon had it been your opinion free to compete fairly in the market for the year 1972, October 12, 1972?

A. Yes.

Q. And what was that value?

A. If I recall, we arrived at the figure that the operation in Galveston, Texas, had the potential to earn some $400,000 per year by utilizing the plant fully, and we projected that against some eight years or eight times earnings as a damage figure.

---

[10]An antitrust plaintiff's estimate of net profits, without actual accounting records is clearly admissible and may be considered by the jury. *Ranger v. Sterling Nelson & Sons*, 351 F.2d 851, 856. (9th Cir. 1965)

Q. How did you select eight years or eight times earnings?

A. We felt that this was — that businesses in the United States sell something from — well, all the way up to 15 to 1 down to 4 or 5 to 1, and that eight was a common figure for sale.

Q. And what was your total projection based upon those calculations in your testimony with regard to the value of Daiflon on October 12, 1972, assuming a free and competitive market?

A. Some $3 million plus, eight times the figure that we had.*** (*Id.* pp. 205-206)

Further testimony was received regarding Daiflon's business and property losses by virtue of the testimony of Robert B. McDonald. Mr. Carter had previously testified that Mr. McDonald had paid $100,000.00 for his stock and had loaned the corporation an additional $100,000.00. (Carter, Tr. p. 142). After McDonald became a stockholder of Daiflon, the company secured a line of credit in the original amount of $400,000.00, which was thereafter increased to $500,000.00. (McDonald Tr. p. 524). In early 1970, according to McDonald, Daiflon had a sound financial condition:

> "I'd say extremely sound for young business. We had that line of credit, $400,000.00. We had an additional working capital of $100,000.00 in the form of a loan. We had $100,000.00 that I invested in my half of the stock, and Mr. Carter and Mr. Adams had each put in $50,000.00." (McDonald Tr. pp. 524-525).

McDonald reaffirmed the testimony of Carter with respect to the injury suffered by Daiflon. He stated that with the establishment of the plant in Galveston sales continued to increase until the latter part of 1971 when "***we just weren't able to sell anything anymore." (McDonald Tr. p. 536). He stated that Daiflon had sufficient refrigerant pro-

ducts at that time with all five tanks practically full (approximately 500,000 pounds). (McDonald Tr. p. 537).

McDonald also testified that Daiflon's debt to its lender in Galveston, was in excess of $500,000.00. (McDonald Tr. p. 542). He further testified that Daiflon had additional liabilities of between $50,000.00 and $100,000.00 to trade creditors. Therefore, the bank debt and other unsecured debt amounted to over $600,000.00. (McDonald Tr. p. 542).

In addition to the testimony of Carter and McDonald relating to Daiflon's damages, plaintiff presented the expert testimony of Dr. Benton Gup. Dr. Gup received his B.A., M.B.A. and Ph.D. at the University of Cincinnati. His experience includes a professorship of Economics at the University of Cincinnati, and two and one-half years as staff economist of the Federal Reserve Bank in Cleveland, Ohio. (Gup Tr. p. 942). He currently is the Professor and Holder of the University of Tulsa Chair of Banking and Finance. He also operates a consulting firm, General Economic Research Corporation, and is an officer in the Financial Management Association, a large professional financial management group. (*Id.* pp. 942-943). Dr. Gup is the author of several books, including a recently published work called *"The Basics of Investing,"* and is currently authoring a book dealing with strategic business planning to be published by McGraw-Hill (*Id.* p. 944).

Dr. Gup was employed by Daiflon in 1973 to determine the fair market value of the company as it would have existed in a free environment in 1972. (*Id.* pp. 945-946). In the process he reviewed certain financial records of Daiflon including balance sheets, income statements and price and cost data. (*Id.*) Dr. Gup reviewed information furnished by DuPont during discovery concerning "sales and outlook" and reviewed security analysts' reports dealing with various companies in the in-

dustry. (*Id.* Additionally, he inspected the DuPont Business Plan, DuPont's field distribution reports, and the published price sheets of all defendants. (*Id.* p. 947)

Dr. Gup testified that he developed a sound method whereby the value of Daiflon could be determined and proceeded to obtain data from which that determination could be made. (*Id.* p. 948) Factors reviewed involved the size of the market, the market share and other relevant financial data. His method involved a statistical technique called "simulation" involving the estimation of certain minimum and maximum values which were then fed into a computer which calculates thousands of combinations, randomly selecting numbers to determine a range of estimates. (*Id.* p. 593) Dr. Gup discussed his findings in detail and concluded that the minimum value of the company could be as low as $610,000.00 and the maximum value could be almost $13,000,000.00. (*Id.* p. 954). The most likely number, according to Dr. Gup, was $2.96 million: "***based on standard statistical techniques, we know that the chances are 68 out of 100 that the actual value of this firm, based upon the assumption that I have in the model and the numbers that we have shown, will fall between 1.2 million and $4.7 million. But, this $2.96 million is the most likely to occur." (*Id.* pp. 954-955). He continued:

> "As a professional economist and financial analyst, I use my considered judgment to determine these numbers, that is, these are the numbers that were put into the computer. The computer had, built into it this model that I have just described to you.
>
> * * *
>
> I believe that this particular model is the best one for determining the value of a going concern, and is one that is widely accepted and used for determining the value of going concerns." (*Id.* p. 956)

The numbers that were put into the computer were selected by Dr. Gup after considerable study and analyses as follows:

Item Number	THE PARAMETERS Value		
	Minimum	Most Likely	Maximum
1 Pounds (millions)	100	142	200
2 Compound growth rate	.020	.120	.180
3 Number of Years	5	10	15
4 Price per pound (weighted average)	.450	.600	.750
5 Market share	.005	.020	.030
6 Net Income as % of sales	.040	.060	.100
7 Discount rate	.040	.055	.083

Dr. Gup testified that the specific numbers used to establish the range of factors described above were obtained from generally available business statistics put out by the United States government, certain recognized reporting organizations, documents furnished by DuPont and financial statements and price lists submitted by Daiflon. (*Id.* p. 963). Additionally, Dr. Gup spent approximately 40 to 50 hours in discussion with Mr. Carter. (*Id.* pp. 964-965). The figures for poundage and compound growth rate (items 1 and 2, *supra.*) were derived by Dr. Gup from his analysis of the DuPont Business Plan and economic data reflecting the dramatic growth in housing starts and consumer durables, the level of economic activity that was going on at that time (1972). The discount rates were determined by Dr. Gup's taking into account the rates of returns and investors' expectations in other chemical companies together with industrial averages of the rate of return in connection with 425 other companies:

"This gives you the return that an average — on what professionals consider the average risk, an average

market company, as a bench marker." (*Id.* pp. 1096-1097)

With respect to the figures used by Dr. Gup in connection with net income as a percent of sales, the numbers were derived from Standard & Poors Value Line Survey and similar sources. (*Id.* pp. 1118-1119).

The price per pound on a weighted average basis was obtained through Dr. Gup's analysis of price sheets furnished by defendants and Daiflon. (*Id.* p. 1073). Dr. Gup assumed that the capacity, growth and capital expenditures would all vary over a time to meet demands. (*Id.* p. 1075).

Dr. Gup testified that the numbers utilized for market shares, ranging from ½ of 1% to 3% were determined by an examination of Daiflon's financial statements, and its actual sales as a percentage of the total market as he determined it. (*Id.* p. 1090-1093).

Finally, Dr. Gup explained the "number of years" utilized in his method:

"A. What I'm saying in this case, how long is this firm going to continue to exist over a time?

So these are really the outside numbers, and you have to make an assumption, and in this case I had the assumption it would last a minimum of five or at least five years. It could out as far as ten years or it may even last as long as fifteen years. A corporation is an ongoing organization. It actually could go on longer. Here it is seven or eight years beyond when we started the case, Mr. Carter is still in good health and running business, so these numbers are certainly within the limits.

We ran a number of simulations where I used ten, fifteen, twenty, instead of five, ten, fifteen, and the values came out approximately double or more what they were.

But after discussions with Mr. Carter and reviewing the data and taking into account what a business of this type might reasonably expect — be expected to last, I settled on the five, ten, fifteen range.

It it were a public utility, I might look at thirty years, or a hot dog stand, you look at a year, so you have to take into account the general nature the business, and based upon my judgment, I settled on five, ten, fifteen." (*Id.* pp. 1055-1056).

D. The Fact of Damage.

The basic rule with respect to the measure of damages in an antitrust case, distinguishing between the fact of damage and the amount of damage, is stated by Von Kalinowski.

> "There is no established formula for the computation of damages in an antitrust action. Each case presents a particular problem as to the cause of plaintiff's monetary losses. There are, however, two general rules to bear in mind. First, as indicated earlier, it is essential to distinguish, in private antitrust cases, between the fact of damage and the amount of damage. They are mutually exclusive concepts and are subject to different burdens of proof. The fact of damage relates to the litigant's standing to sue. The plaintiff must prove with 'reasonable certainty' that injury has occurred. On the other hand, uncertainty as to the extent or amount of damage will not bar recovery." Von Kalinowski, ***Antitrust Law and Trade Regulations,*** 16N, §115.03, p. 115-57.

Von Kalinowski cites the opinion of the United States Supreme Court in ***Story Parchments Co. v. Patterson Parchment Paper Co.,*** 282 U.S. 255, 51 S.Ct. 248, 75

L.Ed. 544 (1932) which describes the distinction as follows:

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish to fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

Without belaboring the point further, any analysis of the evidence regarding proof of the *fact of damage* upon defendants' post-trial motions must take place within the parameters established by (a) the special verdict of the jury and (b) the legal principles applicable to a claim of error by the jury as a finder of fact. (*See* Propositions I and VIII of this memorandum). If the evidence is deemed sufficient by the Court to raise a question for the jury (as determined by the Court on denial of the motion for directed verdict), the motion for judgment n.o.v. must be denied. To the extent that defendants seek a new trial based upon a reappraisal of the evidence, it is clear that it is inappropriate for the court to interfere with the role of the jury as the trier of fact. *Reed Brothers, Inc. v. Monsanto, supra.* at p. 499.

The testimony of Carter and McDonald concerning the fact of damage was clearly sufficient under these standards. Both testified that company sales were increasing during the year 1970, and the outlook was particularly good into 1971 because of the move to Galveston and the advantages offered by that facility. (Carter Tr. pp. 102-105); McDonald Tr. p. 536). In approximately June of 1971 Daiflon began to feel the effect of the 13% price

decrease and its sales "stopped." (Carter Tr. p. 111; McDonald Tr. pp. 547-552). That testimony is uncontroverted. At issue here is the reason that Daiflon's sales stopped, whether from the defendants' price reductions as alleged by plaintiff or from reasons unrelated to the alleged anticompetitive practices, as contended by defendants. That question was clearly and succinctly presented to the jury, and the jury made its special findings. No adequate reason has been presented by defendants to set that finding aside.

E. The Amount of Damages Awarded.

Of particular relevance to the question of the size of the damage award is the decision of the United States Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969) wherein it is stated:

> "Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a trebel-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendence to injury plaintiffs' business, and from the evidence of the decline in prices, profits and values, now shown to be attributable to other causes, that defendants' wrongful acts had caused damage."

The standard of proof regarding amount of damages, as articulated by the Tenth Circuit, is fully consistent with the decision of the Supreme Court in *Zenith Radio:*

"The measure of damages to which plaintiff is entitled in a case of this kind is the pecuniary loss to its business or property resulting proximately from the combination or conspiracy of the defendants. Damages must be actual, not speculative or conjectural. But they are not rendered speculative or conjectural merely because they cannot be calculated merely because they cannot be calculated with mathematical exactness. It is sufficient if a reasonable basis of computation is afforded, even though the result be only an approximation. (citations omitted) Ordinarily, it is the exclusive function of the jury to fix the amount of damages. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., supra.* In doing that, it is the perogative of the jury to make a just and reasonable estimate of the damages based upon relevant data, and render its verdict accordingly. And in doing so, the jury may act upon probable and inferential proof as well as that which is direct and positive. *Bigelow v. RKO Radio Pictures, supra.* While the verdict was large, viewing the record in its entirety we are unable to say that it was grossly excessive or that the trial court abused its discretion in refusing to set it aside on that ground." *Loew's, Inc. v. Cinema Amusements, Inc.,* 210 F.2d 86, 95.

The standard here, then, is fully compatible with the proposition that the jury is charged with the responsibility of finding the facts, and their determination will not be set aside if there is any reasonable basis to sustain it. *See Reed Brothers, Inc. v. Monsanto, supra.,* p. 500. The jury in this case specifically found that plaintiff's evidence with respect to amount of damages was not insufficient or too speculative, but rather had been proved by a preponderance of the evidence, and that the dollar amount of that

value was the sum of $2,500,000.00.[11] There was abundant evidence to support those findings, including, the testimony of Carter with respect to the matters of lost capital investment, loss of profits and value of the business; the testimony of McDonald with respect to loss of capital investment and damages arising from delinquent banking and trade obligations. Finally, Dr. Gup testified as an expert witness regarding the going concern value of Daiflon, and permitted the jury to determine, from a range of values, the value of Daiflon in 1972, assuming freely competitive. Neither the evidence presented by Carter and McDonald, nor the evidence presented by Gup was designed to be an exclusive method of proof. Rather, all the facts so elicited were taken into consideration by the jury in arriving at its special findings. In this regard, it should be recalled that defendants presented *no evidence* of damages.

The opinion of the Fifth Circuit Court of Appeals in *Lehrman v. Gulf Oil Corp.*, 500 F.2d 650 (5th Cir. 1974) is particularly persuasive as it relates to defendants' efforts to discredit plaintiff's expert testimony. In that case the plaintiff determined its damages based upon a method of proof encompassing elements of the "yardstick test" (consisting of a study of the profits of business operations closely comparable to the plaintiff) and the "before and after theory" (comparing the plaintiff's profit record prior to the violation with that subsequent to it). *Gulf Oil* severely attacked the plaintiff's method of proof as not coming within the "traditional model of the yardstick theory." 500 F.2d at 688. The Court rejected Gulf's contention:

---

[11] It would appear that the jury found the actual damage during the operation of the business to be $1,200,000.00 and the future value of $1,300,000.00 which is the figure emphasized to the jury by counsel for Pennwalt.

"Just because Lehrman's method of proof is specially tailored to fit his case, however, does not render it unacceptable. Indeed, this court has recognized that the task of proving sales never made as a means of calculating damages is a difficult one. Thus, 'while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.' The proof may be indirect and it may include estimates based on assumptions, so long as the assumptions rest on adequate data. Lehrman's expert's estimates of lost future profits were based on assumptions regarding volume of gasoline sold, margin and station expense. These assumptions were unquestionably open to challenge and Gulf did challenge them before the jury. Evidentiary support for the assumptions also exists, and we perceive the resolution of the conflicting claims as the traditional responsibility of the jury." 500 F.2d at 668.

In *Lehrman* Gulf further asserted that the plaintiff's business had not been in existence long enough to establish a reliable track record from which to detemrine whether or not it would have made future net profits absent Gulf's violation of the antitrust laws. 500 F.2d at 669. This too was rejected by the Court:

"To deny recovery to a businessman who has struggled to establish a business in the face of wrongful conduct by a competitor simply because he never managed to escape from the quicksand of red ink to the dry land of profitable enterprise would make a mockery of the private antitrust remedy." (*Id.* p. 669)

Plaintiff's damage evidence, taken as a whole, was abundantly adequate to sustain the jury award. It should stand.

PROPOSITION VII

THE COMPUTER PROGRAM UTILIZED BY DR. GUP REPRESENTS A TYPE OF EVIDENCE REASONABLY RELIED UPON BY EXPERTS IN THE FIELD OF ECONOMICS AND THE FACTS OR DATA WHICH CONSTITUTE THE COMPUTER PROGRAM NEED NOT BE ADMISSIBLE IN EVIDENCE

Defendants contend that the Court erred in permitting Dr. Gup to rely, in his testimony as to the value of Daiflon, on a computer program which was run by Fadel Iskander, a computer programmer from the University of Tulsa. In support of this proposition defendants rely upon the case of *6816.5 Acres of Land v. United States,* 411 F.2d 834 (10th Cir. 1969). This case, decided prior to enactment of Rule 703 of the Federal Rules of Evidence, merely indicates that the appellate there, the landowner in a condemnation case, complained that the testimony of the government's valuation expert was based "on his opinion of a colleague's opinion of the area." (*Id.* p. 839). The Court agreed in theory that expert opinion may not be based upon the opinion of others, either in evidence or not in evidence. (*Id.* pp. 839-840). However, the Court held that it was not necessary to determine if that is what occurred in the district court, and left the specific problem undecided.

Rule 703 of the Federal Rules of Evidence provides as follows:

> "The facts of data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. *If of a type reasonably relied upon experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."* (emphasis supplied)

Judge Weinstein, commenting upon the rationale of Rule 703, states:

> "It seems arguable that an expert in a science is presumably competent to judge of the reliability of statements made to him by other investigators or technicians. He seems just as competent indeed to do this as a judge and a jury are to pass upon the credibility of an ordinary witness on the stand. If the statements, then, are attested by the expert as the basis for a judgment upon which he would act in the practice of his profession, it seems that they should ordinarily be a sufficient basis even standing alone for his direct expression of professional opinion on the stand." 3 *Weinstein's Evidence,* §703[01], pp. 703-4-5.

Dr. Gup, qualified as an expert in economics by the court, testified, on direct examination, with respect to the computer program:

> "Q. Now, would you explain in a little bit more detail to the Court and Jury, how the input is made into this computer and how the results are obtained?
>
> A. As a professional economist and financial analyst, I used my considered judgment to determine these numbers, that is, these are the numbers that were put into the computer.
>
> The computer had, built into it, this model that I have just described to you.
>
> Basically the model said what is the total market, how much dollar value is generated by market, what percent of the market does Daiflon have, and what is their income going to be, and then let's bring that income back into today's standards.
>
> It's a standard financial model.

The computer then selected, at random, to make this model run 500 times, values from each of these categories.

Then it summed those values and did the statistical procedure that I have just described to you, to give me a range of numbers, and this most likely number, 2.96 million.

Q. Dr. Gup, why did you select this method in arriving at your determination?

A. For two reasons.

I believe that this particular model is the best one for determining the value of a going concern, and it is the one that is widely accepted and used for determining the values of going concerns.

Second, the statistical simulation that is the statistical part here gave me latitude for the lack of precision for the future." (Gup, Tr. 955-957)

Further, Dr. Gup was intensely cross-examined by counsel for Pennwalt with respect to his "understanding of the computer program." Dr. Gup's answers to counsel's questions plainly demonstrate the propriety of his testimony under the provisions of Rule 703 Fed. R. Evid.:

"Q. Doctor, you're coming into this court and saying, on your oath, that these defendants owe this plaintiff three million dollars.

Now, is a part of your testimony to this effect based on complete ignorance of how that was achieved?

A. Let me answer that question in the following way:

I'm sure everybody is familiar with the little hand-held calculators.

Now, I can punch numbers into a hand-held calculator, two times two, times two, times two,

and come up with a number that I read in the calculator.

So, I know what the input is, I know how to interpret the answers that I get out, but its not necessary for me to understand the electronics or how the silicone chips work in between.

I understand the model that went into the computer, I understand how to interpret the output, and it's not necessary for me to be a technical expert in computer programming." (Gup, Tr. 960-961)

A particularly relevant decision with respect to the applicability of Rule 703 to antitrust actions is *Standard Oil Company of California v. Moore,* 251 F.2d 188 (9th Cir. 1957), *cert. denied,* 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958) which is discussed in some detail in Judge Weinstein's treatise, 3 *Weinstein's Evidence,* §703[02], pp. 703-14-15. In that case, plaintiff, a gasoline retailer, asserted that the defendant oil company had destroyed his business by refusing to deliver to him. The court permitted an expert to testify as to the value of plaintiff's business based upon certain background information and sources, including: (1) a twelve-year history of the service station prepared by the plaintiff; (2) a report of the retail gasoline business in Seattle as disclosed and published data for the nation as a whole; (3) Seattle traffic surveys showing flow of traffic on Fourth Avenue South; (4) service station operating problems as disclosed to the expert in discussions with a representative of an oil company and two gasoline dealers; (5) general economic and business conditions as reported in materials available in the public library. (*Id.* p. 22, fn. 47). The Second Circuit held that such expert testimony was entirely proper:

"It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pre-trial studies and investigations of one kind

or another. Frequently, the information so gained is hearsay or double hearsay, insofar as the trier of the facts is concerned. This, however, does not necessarily stand in the way of receiving expert opinions into evidence. It is for the trial court to determine, in its discretion, whether the expert's sources of information are sufficiently reliable to warrant reception of the opinion. If the court so finds, the expert opinion may be expressed. If the opinion is received, the court may, in its discretion, allow the expert to reveal to the jury the information gained during such investigations and studies. Wide latitude in cross-examination should be allowed." (*Id.* p. 22)

This Court did, in fact, allow wide latitude in cross-examination of Dr. Gup. Unlike the situation referred to in *6816.5 Acres of Land v. United States, supra.*, Dr. Gup was not relying on the report of another economist with respect to the value of Daiflon. Dr. Gup determined and applied the financial model used to establish the value of Daiflon, and Mr. Iskander performed the technical work required by Dr. Gup in the area of computer programming. As Dr. Gup stated: "I understand the model that went into the computer, I understand how to interpret the output, it is not necessary for me to be a technical expert in computer programming." (Gup, Tr. 960-61).[12]

Defendants' contention with respect to Dr. Gup's "lack of competency" is particularly surprising in view of the testimony of Professor Hibdon, defendants' expert. Dr. Hibdon relied upon conclusions of other experts, not

---

[12]It should be noted that counsel for Pennwalt did not object during the direct examination of Dr. Gup to his utilization of the Iskander program. Rule 103 Fed. R. Evid. Moreover, defendants had listed Dr. Edward Stafford of the University of Oklahoma, a computer programmer, as an expert witness to testify with respect to the Iskander program, but ultimately failed to call him as a witness. (See more complete discussion of this issue in Proposition X, *infra.*)

otherwise admissible into evidence, in making his findings. One example was a lengthy "research report" which was a survey of the fluorocarbon refrigerant market prepared for Union Carbide Corporation. (Hibdon Trans., cross-examination following mid-afternoon recess, pp. 32-42). Plaintiff would acknowledge that the reports of other experts which Dr. Hibdon utilized were of a type reasonably relied upon by experts in economics. The same principle applies to Dr. Gup's utilization of the technical capabilities of Mr. Iskander, a computer programmer.

One further comment should be made: the Court, with respect to the admission or exclusion of evidence, necessarily must exercise wide and flexible discretion. Wright & Miller, *Federal Practice & Procedure,* §2885; Rule 61 F.R.Civ.P. In the event that it is determined that the court's considered discretion has been abused with respect to the admission of evidence, the next question which must be answered is whether "a substantial right" has been invaded to warrant post-judgment relief. Rule 61 F.R.Civ.P. In this case, not only has no such showing been made, but defendants' failure to timely object to the proferred testimony at trial entirely precludes the present objection. Rule 103 Fed. R. Evid.

PROPOSITION VIII

DEFENDANTS HAVE FAILED TO FAIRLY PRESENT THE STANDARDS APPLICABLE TO THE MOTION FOR NEW TRIAL

The memorandum filed by defendants in support of the Motion for New Trial (hereinafter "New Trial Brief") commences with a discussion of standards applicable to consideration of motions presented under Rule 59 F.R.Civ.P. Daiflon acknowledges the validity of many of the principles relied upon by defendants, to-wit: (a) that this Court has broad discretion to see that its final judgment does not represent a miscarriage of justice; (b) that

the power of the court to grant a new trial on the ground that the verdict is against the weight of the evidence is clear; (c) that "[n]o precise verbal formula has evolved as to how the evidence should be weighed, but certain principles are apparent." (New Trial Brief, pp. 1-3; *See also* Wright & Miller, *Federal Practice & Procedure,* §§2801, 2803, 2805-06.)

However, there are certain other fundamental standards, widely accepted by district and circuit courts, which are conspicuously missing from the defendants' memorandum. Perhaps one of the most comprehensive discussions of the applicable standards is set forth in the opinion of the Eighth Circuit in *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.,* 466 F.2d 179 (8th Cir. 1972). In that case Judge Regan of the United States District Court for the Eastern District of Missouri granted the defendant's motion for judgment n.o.v. and, alternatively, its motion for a new trial. Upon appeal, the Eighth Circuit reversed the judgment and remanded the case with directions to enter a judgment on the verdict for the plaintiff. The Eighth Circuit reviewed in detail decisions of the United States Supreme Court and the circuit courts of appeal, together with Professor Moore's treatise on federal practice in determining the propriety of the trial judge's resolution of the post-trial motions. (*Id.* pp. 185-187). The Court first noted that generally it had upheld the exercise of the trial court's grant of a new trial as within the lower court's discretion. The Court then discussed the distinction in standards applicable to motions for a new trial and for judgment n.o.v. and concluded that while on the motion for new trial the district court's discretion was wider than in motions for judgment n.o.v., that discretion was "not unlimited." (*Id.* p. 186); *Simpson v. Skelly Oil Co.,* 371 F.2d 563, 566, 567 (8th Cir. 1967). Also cited was the admonition of the United States Supreme Court in *Tennant v. Peoria & Pekin Union*

Railway, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944) wherein it is stated:

> "Court are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."[13]

The Court in *Aalco Wrecking* further stated that the trial judge should not grant a new trial merely because he believes another result would be more reasonable, and cited the opinion of the Fifth Circuit in *Hampton v. Magnolia Touring Company,* 338 F.2d 303 (5th Cir. 1964) wherein that court delineated the basis on which a trial court may require a new trial on the weight of the evidence:

> "Although the cases are not consistent in usage, some cases using the phrase 'clear weight' and others using the phrase 'overwhelming weight' or 'overwhelming evidence', it seems fair that the jury's verdict must at least be against the *great* weight of the evidence before a new trial may be granted." (emphasis original), 403 F.2d at 540.

Otherwise, the Fifth Circuit adds, it "would destroy the role of the jury as the principal trier of the facts, and would enable the trial judge to disregard the jury's verdict at will." (*Id.*); *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, at p. 187. Finally, the Court in *Fireman's Fund* stated that if the evidence is such that reasonable men may differ as to the result, the determina-

---

[13]The Court in *Aalco Wrecking* noted that the foregoing excerpt from the opinion of the Supreme Court in *Tennant v. Peoria & Pekin Union Railway*, was made in reference to a judgment n.o.v.; nevertheless, the Eighth Circuit found, "as have other circuit courts of apeal, this admonition similarly applicable in dealing with motions for new trial." *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, p. 187, see cases collected in footnote 10 thereof.

tion should be properly be left to the jury. (*Id.*); *see Berner v. British Commonwealth PAC Airlines, Ltd.*, 346 F.2d 532, 538 (2d Cir. 1965), cert. denied, 382 U.S. 983, 86 S.Ct. 559, 15 L.Ed. 2d 472 (1966). The latter principle finds support in Wright & Miller's treatise.

> "The mere fact that the evidence is in conflict is not enough to set aside the verdict. Indeed, the more sharply the evidence conflicts the more reluctant a judge should be to substitute his judgment for that of the jury." Wright & Miller, *Federal Practice & Procedure*, §2806, p. 44.

In Proposition I of this Response, Daiflon has provided a detailed discussion of the opinion of the Eighth Circuit in *Reed Brothers, Inc. v. Monsanto Company*, 525 F.2d 486 (8th Cir. 1975), *cert. denied*, 96 S.Ct. 787. Justice Clark, with respect to the reversal of the trial court's alternative grant of the motion for new trial therein, stated that while the grant of a new trial is peculiarly within the trial court's discretion, a different situation exists where the grant is predicated upon the district court's "appraisal of the evidence." 525 F.2d at 499. Noting that the trial judge in such situations should not interfere with the role of the jury as trier of fact (citing *Fireman's Fund* as authority), Justice Clark determined that the "***evidence was such that reasonable men could differ as to result, and there existed no significant weight favoring Monsanto." (*Id.* p. 500) Accordingly, the jury determination should have been left standing and the alternative grant of a new trial was improper. (*Id.*)

Since defendants, in their new trial brief rely heavily upon the perceptions of Wright and Miller with respect to the question of the standards applicable to the question of whether the verdict is or is not against the weight of the evidence, it is appropriate to excerpt from that treatise (and specifically from the section most utilized by defend-

ants in their brief) the authors conclusions:

> "On the one hand, the trial judge does not sit to approve miscarriages of justice. His power to set aside the verdict is supported by clear precedent at law and, far from being a denigration or a usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all that the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial." Wright & Miller, *Federal Practice & Procedure,* §2806, p. 49.

It is particularly interesting that defendants' New Trial Brief, while quoting exhaustively from various federal decisions, and referencing Rules 50, 59 and 60(b) of the Federal Rules of Civil Procedure, does not contain a single citation to Rule 61 F.R.Civ.P. That rule provides as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does

specific questions, at defendants' request. Accordingly, this Court is not left with speculation or guesswork with respect to the findings made by the jury on the dispositive issues presented by the parties. The jury found each and every issue with respect to Daiflon's claims of conspiracy, monopolization and attempted monopolization in favor of the plaintiff and against defendants. Consequently, as a prerequisite to the grant of a new trial in this case, it would be incumbent upon the Court to determine that the jury had committed a mistake with respect to each such finding, or with respect to particular findings, and that such mistakes were of a nature sufficient to justify the grant of a new trial. Plaintiff respectfully suggests that, in view of the overwhelming evidence presented at trial by Daiflon in support of each of its claims, and on the issues of causation and damages, the Court clearly should permit the verdict to stand in its entirety.

PROPOSITION IX

THE EXHIBITS INTRODUCED BY PLAINTIFF DURING TRIAL MET THE STANDARDS FOR ADMISSION UNDER THE FEDERAL RULES OF EVIDENCE

A. The Requirements of the Pre-Trial Orders.

Defendants argue that the Court committed error, sufficient to justify the grant of a new trial, by admitting into evidence certain of plaintiff's exhibits which were (a) not properly authenticated and/or (b) not within the business records exception to the hearsay rule. (New Trial Brief, p. 15). The contention is advanced that defendants were unable to raise objections as to the authenticity of specific documents prior to trial because they were "***without a clear idea of the nature of the documentary evidence to which they would be required to respond." (*Id.* p. 16) Apparently, this argument by defendants is an

"The measure of damages to which plaintiff is entitled in a case of this kind is the pecuniary loss to its business or property resulting proximately from the combination or conspiracy of the defendants. Damages must be actual, not speculative or conjectural. But they are not rendered speculative or conjectural merely because they cannot be calculated merely because they cannot be calculated with mathematical exactness. It is sufficient if a reasonable basis of computation is afforded, even though the result be only an approximation. (citations omitted) Ordinarily, it is the exclusive function of the jury to fix the amount of damages. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., supra.* In doing that, it is the perogative of the jury to make a just and reasonable estimate of the damages based upon relevant data, and render its verdict accordingly. And in doing so, the jury may act upon probable and inferential proof as well as that which is direct and positive. *Bigelow v. RKO Radio Pictures, supra.* While the verdict was large, viewing the record in its entirety we are unable to say that it was grossly excessive or that the trial court abused its discretion in refusing to set it aside on that ground." *Loew's, Inc. v. Cinema Amusements, Inc.*, 210 F.2d 86, 95.

The standard here, then, is fully compatible with the proposition that the jury is charged with the responsibility of finding the facts, and their determination will not be set aside if there is any reasonable basis to sustain it. *See Reed Brothers, Inc. v. Monsanto, supra.*, p. 500. The jury in this case specifically found that plaintiff's evidence with respect to amount of damages was not insufficient or too speculative, but rather had been proved by a preponderance of the evidence, and that the dollar amount of that

value was the sum of $2,500,000.00.[11] There was abundant evidence to support those findings, including, the testimony of Carter with respect to the matters of lost capital investment, loss of profits and value of the business; the testimony of McDonald with respect to loss of capital investment and damages arising from delinquent banking and trade obligations. Finally, Dr. Gup testified as an expert witness regarding the going concern value of Daiflon, and permitted the jury to determine, from a range of values, the value of Daiflon in 1972, assuming freely competitive. Neither the evidence presented by Carter and McDonald, nor the evidence presented by Gup was designed to be an exclusive method of proof. Rather, all the facts so elicited were taken into consideration by the jury in arriving at its special findings. In this regard, it should be recalled that defendants presented *no evidence* of damages.

The opinion of the Fifth Circuit Court of Appeals in *Lehrman v. Gulf Oil Corp.*, 500 F.2d 650 (5th Cir. 1974) is particularly persuasive as it relates to defendants' efforts to discredit plaintiff's expert testimony. In that case the plaintiff determined its damages based upon a method of proof encompassing elements of the "yardstick test" (consisting of a study of the profits of business operations closely comparable to the plaintiff) and the "before and after theory" (comparing the plaintiff's profit record prior to the violation with that subsequent to it). *Gulf Oil* severely attacked the plaintiff's method of proof as not coming within the "traditional model of the yardstick theory." 500 F.2d at 688. The Court rejected Gulf's contention:

---

[11]It would appear that the jury found the actual damage during the operation of the business to be $1,200,000.00 and the future value of $1,300,000.00 which is the figure emphasized to the jury by counsel for Pennwalt.

"Just because Lehrman's method of proof is specially tailored to fit his case, however, does not render it unacceptable. Indeed, this court has recognized that the task of proving sales never made as a means of calculating damages is a difficult one. Thus, 'while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.' The proof may be indirect and it may include estimates based on assumptions, so long as the assumptions rest on adequate data. Lehrman's expert's estimates of lost future profits were based on assumptions regarding volume of gasoline sold, margin and station expense. These assumptions were unquestionably open to challenge and Gulf did challenge them before the jury. Evidentiary support for the assumptions also exists, and we perceive the resolution of the conflicting claims as the traditional responsibility of the jury." 500 F.2d at 668.

In *Lehrman* Gulf further asserted that the plaintiff's business had not been in existence long enough to establish a reliable track record from which to detemrine whether or not it would have made future net profits absent Gulf's violation of the antitrust laws. 500 F.2d at 669. This too was rejected by the Court:

"To deny recovery to a businessman who has struggled to establish a business in the face of wrongful conduct by a competitor simply because he never managed to escape from the quicksand of red ink to the dry land of profitable enterprise would make a mockery of the private antitrust remedy." (*Id.* p. 669)

Plaintiff's damage evidence, taken as a whole, was abundantly adequate to sustain the jury award. It should stand.

PROPOSITION VII

THE COMPUTER PROGRAM UTILIZED BY DR. GUP REPRESENTS A TYPE OF EVIDENCE REASONABLY RELIED UPON BY EXPERTS IN THE FIELD OF ECONOMICS AND THE FACTS OR DATA WHICH CONSTITUTE THE COMPUTER PROGRAM NEED NOT BE ADMISSIBLE IN EVIDENCE

Defendants contend that the Court erred in permitting Dr. Gup to rely, in his testimony as to the value of Daiflon, on a computer program which was run by Fadel Iskander, a computer programmer from the University of Tulsa. In support of this proposition defendants rely upon the case of *6816.5 Acres of Land v. United States,* 411 F.2d 834 (10th Cir. 1969). This case, decided prior to enactment of Rule 703 of the Federal Rules of Evidence, merely indicates that the appellate there, the landowner in a condemnation case, complained that the testimony of the government's valuation expert was based "on his opinion of a colleague's opinion of the area." (*Id.* p. 839). The Court agreed in theory that expert opinion may not be based upon the opinion of others, either in evidence or not in evidence. (*Id.* pp. 839-840). However, the Court held that it was not necessary to determine if that is what occurred in the district court, and left the specific problem undecided.

Rule 703 of the Federal Rules of Evidence provides as follows:

> "The facts of data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. *If of a type reasonably relied upon experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."* (emphasis supplied)

Judge Weinstein, commenting upon the rationale of Rule 703, states:

> "It seems arguable that an expert in a science is presumably competent to judge of the reliability of statements made to him by other investigators or technicians. He seems just as competent indeed to do this as a judge and a jury are to pass upon the credibility of an ordinary witness on the stand. If the statements, then, are attested by the expert as the basis for a judgment upon which he would act in the practice of his profession, it seems that they should ordinarily be a sufficient basis even standing alone for his direct expression of professional opinion on the stand." 3 *Weinstein's Evidence,* §703[01], pp. 703-4-5.

Dr. Gup, qualified as an expert in economics by the court, testified, on direct examination, with respect to the computer program:

> "Q. Now, would you explain in a little bit more detail to the Court and Jury, how the input is made into this computer and how the results are obtained?
>
> A. As a professional economist and financial analyst, I used my considered judgment to determine these numbers, that is, these are the numbers that were put into the computer.
>
> The computer had, built into it, this model that I have just described to you.
>
> Basically the model said what is the total market, how much dollar value is generated by market, what percent of the market does Daiflon have, and what is their income go' to be, and then let's bring that income back ..nto today's standards.
>
> It's a standard financial model.

The computer then selected, at random, to make this model run 500 times, values from each of these categories.

Then it summed those values and did the statistical procedure that I have just described to you, to give me a range of numbers, and this most likely number, 2.96 million.

Q. Dr. Gup, why did you select this method in arriving at your determination?

A. For two reasons.

I believe that this particular model is the best one for determining the value of a going concern, and it is the one that is widely accepted and used for determining the values of going concerns.

Second, the statistical simulation that is the statistical part here gave me latitude for the lack of precision for the future." (Gup, Tr. 955-957)

Further, Dr. Gup was intensely cross-examined by counsel for Pennwalt with respect to his "understanding of the computer program." Dr. Gup's answers to counsel's questions plainly demonstrate the propriety of his testimony under the provisions of Rule 703 Fed. R. Evid.:

"Q. Doctor, you're coming into this court and saying, on your oath, that these defendants owe this plaintiff three million dollars.

Now, is a part of your testimony to this effect based on complete ignorance of how that was achieved?

A. Let me answer that question in the following way:

I'm sure everybody is familiar with the little hand-held calculators.

Now, I can punch numbers into a hand-held calculator, two times two, times two, times two,

and come up with a number that I read in the calculator.

So, I know what the input is, I know how to interpret the answers that I get out, but its not necessary for me to understand the electronics or how the silicone chips work in between.

I understand the model that went into the computer, I understand how to interpret the output, and it's not necessary for me to be a technical expert in computer programming." (Gup, Tr. 960-961)

A particularly relevant decision with respect to the applicability of Rule 703 to antitrust actions is *Standard Oil Company of California v. Moore,* 251 F.2d 188 (9th Cir. 1957), *cert. denied,* 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958) which is discussed in some detail in Judge Weinstein's treatise, 3 *Weinstein's Evidence,* §703[02], pp. 703-14-15. In that case, plaintiff, a gasoline retailer, asserted that the defendant oil company had destroyed his business by refusing to deliver to him. The court permitted an expert to testify as to the value of plaintiff's business based upon certain background information and sources, including: (1) a twelve-year history of the service station prepared by the plaintiff; (2) a report of the retail gasoline business in Seattle as disclosed and published data for the nation as a whole; (3) Seattle traffic surveys showing flow of traffic on Fourth Avenue South; (4) service station operating problems as disclosed to the expert in discussions with a representative of an oil company and two gasoline dealers; (5) general economic and business conditions as reported in materials available in the public library. (*Id.* p. 22, fn. 47). The Second Circuit held that such expert testimony was entirely proper:

"It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pre-trial studies and investigations of one kind

or another. Frequently, the information so gained is hearsay or double hearsay, insofar as the trier of the facts is concerned. This, however, does not necessarily stand in the way of receiving expert opinions into evidence. It is for the trial court to determine, in its discretion, whether the expert's sources of information are sufficiently reliable to warrant reception of the opinion. If the court so finds, the expert opinion may be expressed. If the opinion is received, the court may, in its discretion, allow the expert to reveal to the jury the information gained during such investigations and studies. Wide latitude in cross-examination should be allowed." (*Id.* p. 22)

This Court did, in fact, allow wide latitude in cross-examination of Dr. Gup. Unlike the situation referred to in *6816.5 Acres of Land v. United States, supra.*, Dr. Gup was not relying on the report of another economist with respect to the value of Daiflon. Dr. Gup determined and applied the financial model used to establish the value of Daiflon, and Mr. Iskander performed the technical work required by Dr. Gup in the area of computer programming. As Dr. Gup stated: "I understand the model that went into the computer, I understand how to interpret the output, it is not necessary for me to be a technical expert in computer programming." (Gup, Tr. 960-61).[12]

Defendants' contention with respect to Dr. Gup's "lack of competency" is particularly surprising in view of the testimony of Professor Hibdon, defendants' expert. Dr. Hibdon relied upon conclusions of other experts, not

[12]It should be noted that counsel for Pennwalt did not object during the direct examination of Dr. Gup to his utilization of the Iskander program. Rule 103 Fed. R. Evid. Moreover, defendants had listed Dr. Edward Stafford of the University of Oklahoma, a computer programmer, as an expert witness to testify with respect to the Iskander program, but ultimately failed to call him as a witness. (See more complete discussion of this issue in Proposition X, *infra*.)

otherwise admissible into evidence, in making his findings. One example was a lengthy "research report" which was a survey of the fluorocarbon refrigerant market prepared for Union Carbide Corporation. (Hibdon Trans., cross-examination following mid-afternoon recess, pp. 32-42). Plaintiff would acknowledge that the reports of other experts which Dr. Hibdon utilized were of a type reasonably relied upon by experts in economics. The same principle applies to Dr. Gup's utilization of the technical capabilities of Mr. Iskander, a computer programmer.

One further comment should be made: the Court, with respect to the admission or exclusion of evidence, necessarily must exercise wide and flexible discretion. Wright & Miller, *Federal Practice & Procedure,* §2885; Rule 61 F.R.Civ.P. In the event that it is determined that the court's considered discretion has been abused with respect to the admission of evidence, the next question which must be answered is whether "a substantial right" has been invaded to warrant post-judgment relief. Rule 61 F.R.Civ.P. In this case, not only has no such showing been made, but defendants' failure to timely object to the proferred testimony at trial entirely precludes the present objection. Rule 103 Fed. R. Evid.

PROPOSITION VIII

DEFENDANTS HAVE FAILED TO FAIRLY PRESENT THE STANDARDS APPLICABLE TO THE MOTION FOR NEW TRIAL

The memorandum filed by defendants in support of the Motion for New Trial (hereinafter "New Trial Brief") commences with a discussion of standards applicable to consideration of motions presented under Rule 59 F.R.Civ.P. Daiflon acknowledges the validity of many of the principles relied upon by defendants, to-wit: (a) that this Court has broad discretion to see that its final judgment does not represent a miscarriage of justice; (b) that

the power of the court to grant a new trial on the ground that the verdict is against the weight of the evidence is clear; (c) that "[n]o precise verbal formula has evolved as to how the evidence should be weighed, but certain principles are apparent." (New Trial Brief, pp. 1-3; *See also* Wright & Miller, *Federal Practice & Procedure,* §§2801, 2803, 2805-06.)

However, there are certain other fundamental standards, widely accepted by district and circuit courts, which are conspicuously missing from the defendants' memorandum. Perhaps one of the most comprehensive discussions of the applicable standards is set forth in the opinion of the Eighth Circuit in *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.,* 466 F.2d 179 (8th Cir. 1972). In that case Judge Regan of the United States District Court for the Eastern District of Missouri granted the defendant's motion for judgment n.o.v. and, alternatively, its motion for a new trial. Upon appeal, the Eighth Circuit reversed the judgment and remanded the case with directions to enter a judgment on the verdict for the plaintiff. The Eighth Circuit reviewed in detail decisions of the United States Supreme Court and the circuit courts of appeal, together with Professor Moore's treatise on federal practice in determining the propriety of the trial judge's resolution of the post-trial motions. (*Id.* pp. 185-187). The Court first noted that generally it had upheld the exercise of the trial court's grant of a new trial as within the lower court's discretion. The Court then discussed the distinction in standards applicable to motions for a new trial and for judgment n.o.v. and concluded that while on the motion for new trial the district court's discretion was wider than in motions for judgment n.o.v., that discretion was "not unlimited." (*Id.* p. 186); *Simpson v. Skelly Oil Co.,* 371 F.2d 563, 566, 567 (8th Cir. 1967). Also cited was the admonition of the United States Supreme Court in *Tennant v. Peoria & Pekin Union*

Railway, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944) wherein it is stated:

> "Court are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."[1]

The Court in *Aalco Wrecking* further stated that the trial judge should not grant a new trial merely because he believes another result would be more reasonable, and cited the opinion of the Fifth Circuit in *Hampton v. Magnolia Touring Company,* 338 F.2d 303 (5th Cir. 1964) wherein that court delineated the basis on which a trial court may require a new trial on the weight of the evidence:

> "Although the cases are not consistent in usage, some cases using the phrase 'clear weight' and others using the phrase 'overwhelming weight' or 'overwhelming evidence', it seems fair that the jury's verdict must at least be against the *great* weight of the evidence before a new trial may be granted." (emphasis original), 403 F.2d at 540.

Otherwise, the Fifth Circuit adds, it "would destroy the role of the jury as the principal trier of the facts, and would enable the trial judge to disregard the jury's verdict at will." (*Id.*); *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, at p. 187. Finally, the Court in *Fireman's Fund* stated that if the evidence is such that reasonable men may differ as to the result, the determina-

---

[1]The Court in *Aalco Wrecking* noted that the foregoing excerpt from the opinion of the Supreme Court in *Tennant v. Peoria & Pekin Union Railway*, was made in reference to a judgment n.o.v.; nevertheless, the Eighth Circuit found, "as have other circuit courts of apeal, this admonition similarly applicable in dealing with motions for new trial." *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, p. 187, see cases collected in footnote 10 thereof.

tion should be properly be left to the jury. (*Id.*); *see Berner v. British Commonwealth PAC Airlines, Ltd.*, 346 F.2d 532, 538 (2d Cir. 1965), cert. denied, 382 U.S. 983, 86 S.Ct. 559, 15 L.Ed. 2d 472 (1966). The latter principle finds support in Wright & Miller's treatise.

> "The mere fact that the evidence is in conflict is not enough to set aside the verdict. Indeed, the more sharply the evidence conflicts the more reluctant a judge should be to substitute his judgment for that of the jury." Wright & Miller, *Federal Practice & Procedure,* §2806, p. 44.

In Proposition I of this Response, Daiflon has provided a detailed discussion of the opinion of the Eighth Circuit in *Reed Brothers, Inc. v. Monsanto Company,* 525 F.2d 486 (8th Cir. 1975), *cert. denied,* 96 S.Ct. 787. Justice Clark, with respect to the reversal of the trial court's alternative grant of the motion for new trial therein, stated that while the grant of a new trial is peculiarly within the trial court's discretion, a different situation exists where the grant is predicated upon the district court's "appraisal of the evidence." 525 F.2d at 499. Noting that the trial judge in such situations should not interfere with the role of the jury as trier of fact (citing *Fireman's Fund* as authority), Justice Clark determined that the "***evidence was such that reasonable men could differ as to result, and there existed no significant weight favoring Monsanto." (*Id.* p. 500) Accordingly, the jury determination should have been left standing and the alternative grant of a new trial was improper. (*Id.*)

Since defendants, in their new trial brief rely heavily upon the perceptions of Wright and Miller with respect to the question of the standards applicable to the question of whether the verdict is or is not against the weight of the evidence, it is appropriate to excerpt from that treatise (and specifically from the section most utilized by defend-

ants in their brief) the authors conclusions:

> "On the one hand, the trial judge does not sit to approve miscarriages of justice. His power to set aside the verdict is supported by clear precedent at law and, far from being a denigration or a usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all that the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial." Wright & Miller, *Federal Practice & Procedure,* §2806, p. 49.

It is particularly interesting that defendants' New Trial Brief, while quoting exhaustively from various federal decisions, and referencing Rules 50, 59 and 60(b) of the Federal Rules of Civil Procedure, does not contain a single citation to Rule 61 F.R.Civ.P. That rule provides as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does

not affect the substantial right of the parties." Wright and Miller declare that "[t]he importance of Rule 61 in its application to motions for a new trial cannot be overlooked*** (recitations to portions of rule omitted) ***Thus it is only those errors that have caused substantial harm to the losing party that can justify a new trial. Those errors that are not prejudicial do not call for relief under Rule 59." Wright & Miller, *Federal Practice & Procedure,* §2805, p. 41. This principle is especially critical in connection with the proposition urged by defendants with respect to the Court's alleged error in admitting certain written statements and failing to strike the testimony of the witness Scott Campbell. (New Trial Brief, pp. 13-22). The principle here, not alluded to in defendants' brief, is clear:

> "Claims of error with regard to the admission or exclusion of evidence are prime candidates for application of the harmless error rule. Hardly anywhere does the inherent nature of an adversary trial commit so much to the careful, but wide and flexible, discretion of the trial judge as it does on questions of admissibility of evidence. Whether a 'substantial right' has been invaded is dependent on the circumstances of the case, and the proceedings will not be disturbed, on post-trial motion in the district court on an appeal, unless any error of the court was truly harmful." Wright & Miller, *Federal Practice & Procedure,* §2885, p. 282.

One further point, which specifically relates to the motion before this Court, should be made: In the process of determining whether or not this Court should accept the jury's verdict, or whether that verdict should be set aside and a new trial granted, the type of verdict rendered should be considered. Defendants, in their New Trial Brief, as well as the brief filed in support of their motion for judgment n.o.v., pay little heed to the fact that the jury in this case returned a special verdict, answering

specific questions, at defendants' request. Accordingly, this Court is not left with speculation or guesswork with respect to the findings made by the jury on the dispositive issues presented by the parties. The jury found each and every issue with respect to Daiflon's claims of conspiracy, monopolization and attempted monopolization in favor of the plaintiff and against defendants. Consequently, as a prerequisite to the grant of a new trial in this case, it would be incumbent upon the Court to determine that the jury had committed a mistake with respect to each such finding, or with respect to particular findings, and that such mistakes were of a nature sufficient to justify the grant of a new trial. Plaintiff respectfully suggests that, in view of the overwhelming evidence presented at trial by Daiflon in support of each of its claims, and on the issues of causation and damages, the Court clearly should permit the verdict to stand in its entirety.

PROPOSITION IX

THE EXHIBITS INTRODUCED BY PLAINTIFF DURING TRIAL MET THE STANDARDS FOR ADMISSION UNDER THE FEDERAL RULES OF EVIDENCE

A. The Requirements of the Pre-Trial Orders.

Defendants argue that the Court committed error, sufficient to justify the grant of a new trial, by admitting into evidence certain of plaintiff's exhibits which were (a) not properly authenticated and/or (b) not within the business records exception to the hearsay rule. (New Trial Brief, p. 15). The contention is advanced that defendants were unable to raise objections as to the authenticity of specific documents prior to trial because they were "***without a clear idea of the nature of the documentary evidence to which they would be required to respond." (*Id.* p. 16) Apparently, this argument by defendants is an

effort to escape the undisputed fact that they failed to comply with the pre-trial order of May 15, 1978. Under the "Exhibits" section of that order it is provided: "The parties have agreed that identification will be waived as to any documents and exhibits produced by either side in open court. All objections as to relevancy and competency will be preserved." (Pre-Trial Order, p. 6) However, the Court also included in the pre-trial order, by references at pages 1 and 7, procedures suggested by Mr. Coleman Hayes, counsel to DuPont, in his letter to the Court of May 10, 1978. In numbered paragraph 3(a) of that letter, it is stated:

> "Within 30 days after the entry of the Pre-Trial Order, plaintiff will produce for defendants each exhibit that it intends to introduce at trial. Thereafter, within 60 days after receipt of these exhibits, each defendant will produce for plaintiff each exhibit which that defendant intends to introduce at trial.
>
> * * *
>
> Under this schedule, this exchange of exhibits and witnesses would be accomplished by mid-August, approximately a month before the September 11 trial date, *and adequate time will be available prior to trial to determine whether there will be any problems with regard to authenticity and genuineness of any exhibit,* as well as to determine the order of proof for the convenience of the Court and the parties. Objections as to the relevancy and competency of any evidence proferred will be preserved." (emphasis supplied).

Thereafter, on June 26, 1978 the Court entered its Supplement to Pre-Trial Order providing for exchange of trial exhibits on July 24, 1978. On July 24, as contemplated by order of June 26, plaintiff and defendants exchanged marked and numbered copies of their exhibits.

Each and every one of plaintiff's exhibits at issue here were provided to defendants at that time.

On August 7, 1978 the Court filed its Suggested Trial Procedure. At numbered paragraph 2, it is stated:

> "With reference to exhibit, plaintiff and defendant counsel are requested to submit to each other within ten (10) days the exhibits each propose to use, and if there are any objections by any party as to the admissibility of any of the exhibits, such objections and the exhibit objected to shall be furnished to the court within 15 days from this date for in camera evaluation and ruling as to admissibility before this trial begins."

The Suggested Trial Procedure is, of course, fully consistent with the Court's initial order of May 15, incorporating Mr. Hayes' letter of May 10. The entire thrust of these orders is to assure disposition of preliminary questions as to admissibility well in advance of trial, thereby avoiding unnecessary problems and surprise at trial.

The record in this case establishes two uncontroverted propositions regarding defendants' belated claim that certain of plaintiff's exhibits are not properly authenticated, to-wit: (1) defendants plainly did not comply with the pre-trial order and supplementary orders and suggestions of the Court relating thereto with respect to the procedure to be followed regarding the identification and authenticity of exhibits; and (2) defendants have not, on a single occasion, actually *denied* that any of the questioned exhibits are authentic. Defendants now contend that plaintiff failed to prove the exhibits to be authentic, and that defendants' failure to object to any of the exhibits on the basis of authenticity prior to trial was excusable because of the large number of exhibits listed by plaintiff.

Defendants apparently contend that they effected a

unilateral modification of the terms of the pre-trial order through a letter dated January 17, 1979 to plaintiff's counsel and the alleged failure of plaintiff to respond to that letter. However, as the Court will recall, counsel to the plaintiff stated in open court that he did in fact respond to that letter by a discussion with counsel for Kaiser. The record will reflect that counsel for Kaiser upon being confronted with counsel for plaintiff's statement that he did in fact reply to the January 17th letter, did not deny that the discussion in fact occurred, but questioned counsel's recollection of the place of the discussion. In any event, it is clear that defendants may not unilaterally abridge the pre-trial orders of this Court by letter directed to plaintiff's counsel.

The defendants' continued complaint about the number of plaintiff's exhibits is clearly designed as an endeavor to mislead the Court. At page 16, lines 2-5, the defendants have stated:

> "Defendants received from plaintiff prior to trial a listing of approximately 2,000 exhibits, with an implied representation that plaintiff intended to offer those documents as exhibits during its case in chief. Because of the sheer number of the documents, defendants found themselves unable to raise objections to individual documents and without a clear idea of the nature of the documentary evidence to which they would be required to respond."

This statement is very misleading and not representative of the true facts. The Court's Supplement to Pre-Trial Order entered June 26, 1978, provided that:

> "On July 24, 1978, the plaintiff will produce copies of and deliver to the defendants all documents, marked and numbered, to be used by it at *trial.* (emphasis added)
>
> On July 24, 1978, defendants will produce copies of and deliver to plaintiff all documents to be used

by them at trial, but only those documents the defendants intend to use regardless of what documents are to be identified, marked and numbered by the plaintiff and those documents defendants intend to use for any affirmative defense as set forth in the pre-trial order; all documents will be marked and numbered.

On August 28, 1978, *defendants* may respond to plaintiff's production of documents made on July 24, 1978 by supplementing their documents to be used at trial; copies of such additional documents shall be produced and delivered to the plaintiff; all documents will be marked and numbered." (emphasis added)

On August 7, 1978, the Court entered its Suggested Trial Procedure and stated in paragraph 2: "With reference to the exhibits, plaintiff and defendants' counsel are requested to submit to each other within ten (10) days the exhibits each proposed to use, and if there are any objections by any party as to the admissibility of any of the exhibits, such objections and the exhibit objected to shall be furnished to the court within 15 days from this date for in camera evaluation and ruling as to admissibility before this trial begins." On August 15, 1978, upon the request of all parties, the Court agreed that the date for exchange of exhibits could be extended from August 17 to August 22, and the exhibits were subsequently exchanged.

In addition to the exhibits, the defendants were assisted on August 22, 1978 with the following information with regard to how the exhibits were numbered:

Exhibit Series	Exhibit Subject	Exhibits Numbered	Total Exhibits
1-499	Daiflon	0001-0040	40
500-999	Defendants' Price Sheets	500-527	28
1000-2999	DuPont	1000-1359	360
3000-3499	Allied	3000-3125	126
3500-3999	Kaiser	3500-3749	250
4000-4499	Pennwalt	4000-4224	225
4500-4999	Union Carbide	4500-4592	93
5000-5499	Racon	5000-5168	169
6000-6999	ARW	6000-6182	183
7000-7499	Virginia Chemical	7000-7132	133
7500-7999	Penn Engineering	7500-7595	96
8000-8199	International Plastics	8000-8065	66
8200-8299	Jones-Newby	8200-8221	22
8300-8399	Refrigeration Supplies Distributor	8300-8320	21
8400-8499	Waugh Bros.	8400-8405	6
8500-8599	Information Services for Supermarket Equipment	8500-8514	15
8600-8799	Refrigeration Sales Co.	8600-8627	28
8800-8999	Thermal Supply Co.	8800-8840	41
9000-9199	Wittichen Supply	9000-9070	71
9200-9299	Baker Bros.	9200-9268	69
9300-9399	Natkin Service	9300-9322	23
		TOTAL:	2,065

Consequently, the defendants had the above information and the exhibits more than six months prior to the trial. The plaintiff respectfully submits the following observations:

1. The defendants had approximately 200 days within which to review approximately 2,000 exhibits and, consequently, all of the exhibits could have been reviewed by all the defendants' counsel at a very leisurely pace.

2. Many of the exhibits were duplications in view of the fact that copies of originals were introduced during depositions and contained markings apparently made at the time of the depositions; originals of copies were

designated in order to avoid an anticipated objection by defendants that the particular document was not the precise document referred to.

3. The duplications reduced the actual number of exhibits considerably below 2,000.

4. Many of the exhibits were in groups that did not require individual analysis, such as the "Dear John" letters, thirty (30) of which were admitted into evidence.

5. Most, if not all, of the defendants' attorneys were present at the time of the taking of depositions and had copies of those exhibits years in advance of August 22, 1978; the other sources of exhibits were the defendants' files which were examined in 1973 and copies of the documents were provided under the supervision of the defense attorneys.

6. The exhibits designated by the plaintiff on August 22, 1978 were in accordance with the Court's order that the plaintiff deliver to the defendants all documents marked and numbered, to be used by it at trial, which obviously included case in chief, cross-examination and rebuttal.

7. The defendants never requested that the designation be broken down between the case in chief and rebuttal or cross-examination until March 2, 1979, and in response thereto, the plaintiff, on March 5, 1979, designated within the previous designation those exhibits to be introduced by the plaintiff in its case in chief.

8. The defendants did not even raise one objection to any of the exhibits during the more than six months after the designation of exhibits by the plaintiff on August 22, 1978.

It is apparent that the defendants' "complaint" about the number of plaintiff's exhibits is not made in good faith and in any event, certainly is no basis for a motion for a new trial.

B. Summary of Defendants' Argument.

The crux of defendants' position is that 95 documents were allegedly received into evidence "***without the slightest predicate being laid for their admission."[14] (New Trial Brief, p. 17). Defendants state that the exhibits in question were not properly identified in testimony at trial, nor were the documents properly qualified as a business record of any of the defendants or of a third party. (*Id.* p. 17).

C. Procedure Employed by the Court at Trial.

Before discussing the merits of these contentions let us recall the procedure followed by the Court at trial to determine the admissibility of certain of plaintiff's exhibits, including the ones now in question. The Court reserved ruling upon these exhibits until following the conclusion of all of plaintiff's evidence. Accordingly, the parties were able to confer, at the Court's direction, to determine which exhibits could be admitted by agreement. With respect to those exhibits which remained in dispute, each party was given ample time to submit statements in writing pertaining to the admissibility, or lack thereof, of the exhibits. All parties took advantage of the opportunity afforded by the Court, and submitted written statements in connection with each disputed exhibit. Moreover, the Court received, upon request of any party, oral argument in connection with any or all of the disputed exhibits. Counsel for defendants frequently presented their views with respect to objections to a single exhbit on three or more separate occasions. The Court patiently considered the parties' views and objections. Furthermore, by deferring a ruling upon disputed exhibits until the close of plaintiff's evidence, the Court was able to view all of the evidence presented by plaintiff in an effort to determine

[14]The documents which are the subject of this proposition are identified in footnote 10 at page 17 of the New Trial Brief.

issues of authenticity, hearsay and relevancy. The procedure employed by this Court is consistent with the principle that: "Hardly anywhere does the inherent nature of the adversary trial commit so much to the careful, but wide and flexible, discretion of the judge." *Tugwell v. A. F. Klaveness & Co.*, 320 F.2d 866, 869 (5th Cir. 1963) *See* Wright & Miller, *Federal Practice & Procedure,* §2885, p. 282. This reminder of the mandate of Rule 61 is appropriate in connection with the consideration of the claims advanced by defendants.

D. The Question of Authenticity.

Defendants continue to argue, despite clear authority in the Federal Rules of Evidence to the contrary (and an order of the Court from the bench during trial premised upon those rules), that an exhibit may not be authenticated without identification by a "live witness or in deposition testimony." (New Trial Brief, p. 16) The only exceptions which defendants recognize to this "principle" are those described in Rule 902 of the Federal Rules of Evidence where extrinsic evidence of authenticity is not required in connection with certain categories of documents. (*Id.* p. 18, fn. 13). With respect to any of plaintiff's exhibits which were received into evidence by the Court without having been first identified by a witness testifying at trial or by deposition, plaintiff did not then, nor does it now, rely on the provisions of Rule 902.

Initially, of course, it is plaintiff's position that defendants waived their right to object to the authenticity of an exhibit by virtue of their failure to comply with provisions of the pre-trial order and all supplements thereto. However, in the absence of waiver, plaintiff respectfully submits that all exhibits so contested meet the standards of authentication under Rule 901 of the Federal Rules of Evidence. That rule, which specifically defines the re-

quirements of authentication or identification, provides in relevant part:

> "(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

As stated by Judge Weinstein in his treatise on the Federal Rules of Evidence: "The rule (referring to Rule 901) requires only that the Court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification. The rest is up to the jury." 5 *Weinstein's Evidence*, §901(a)[01], p. 901-16. Judge Weinstein continues:

> "This rule does not ignore or repudiate the policy justifications for the authentication requirement. It simply recognizes that where the question is one of probative force or credibility — as it necessarily always is with questions of authenticity and identity — the jury is as competent as the court. The jury is constituted expressly for the purpose of applying common sense and community mores to disputed issues of fact where the principal question is almost always one of credibility. In Rules 104(b), 602, 901(a) and the second sentence of Rule 1008 the court is told to admit where a reasonable juror might find for the proponent on the issue of relevancy. In deciding whether to admit, issues of credibility are decided in favor of the proponent." 5 *Weinstein's Evidence*, §901(a)[02], pp. 901-19-20.

Defendants did not call a single witness at trial to question the authenticity of any of the subject exhibits, nor did they attempt to argue to the jury during their several hours of closing argument that any of the exhibits lacked authenticity.

In their New Trial Brief defendants conveniently omit

any reference at all to Rule 901(b)(4) which provides ample authority for the principle of self-authentication:

> "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: ***(4) distinctive characteristics and alike. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

Judge Weinstein explains the self-authentication provision of Rule 901 as follows:

> "The appearance, physical characteristics, and identifying marks of a writing may sufficiently identify its source to permit the writing's admission into evidence. A letter's physical appearance, postmark, return address, contents, and letterhead may in combination sufficiently authenticate the writing. In essence, the letter's appearance speaks for itself and makes the document self-authenticating." 5 *Weinstein's Evidence,* §901(b)(4)[02], p. 901-51.

The Court made an independent determination with respect to each of plaintiff's exhibits under the provisions of Rule 901. In a ruling from the bench, the Court indicated that, for a document to be self-authenticating, the identity of the author, and his employment capacity, must appear on the face of the document. By carefully reviewing each document against this standard, consistent with Rule 901(b)(4), the Court was able to determine that many of plaintiff's exhibits were authentic and should be admitted, and that others lacked the requisites of admissibility. (See Order dated March 22, 1979, filed in open court). This responsibility was committee to the "careful, but wide and flexible, discretion of the trial judge***." *Tugwell v. A. F. Klaveness & Co., supra.* Defendants have failed to demonstrate that any "substantial right" has been invaded by admission of the exhibits in question. *See* Wright

& Miller, *Federal Practice & Procedure*, §2885, p. 282; Rule 61 F.R.Civ.P.

E. The Hearsay Objection.

Even if the subject exhibits were properly authenticated, defendants assert that they are nevertheless inadmissible because of certain "hearsay" or "double hearsay" aspects, not cured by the business records exception to the hearsay rule. Defendants' argument in this regard, as others previously discussed, is important no so much for the principles acknowledged and applied, but for those which are omitted. As the Court recognized at trial, in order to determine whether a particular exhibit contains inadmissible hearsay it is first necessary to address the issue of whether the document, or any portion thereof, is in fact "hearsay" as defined by Rule 801(c) of the Federal Rules of Evidence, to-wit:

> "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter asserted.*" (emphasis supplied)

At trial the Court laboriously reviewed each of the exhibits which defendants claimed to contain hearsay, and repeatedly questioned plaintiff's counsel with respect to the alleged "hearsay" aspects of each exhibit. In many cases plaintiff stated, and the Court accepted, that the evidence was not offered to prove the truth of the matter asserted, but rather to show that a particular defendant *received* certain information at a point in time. This area of proof is especially important in connection with the question of the intent of a specific defendant or defendants with respect to the commission of certain acts or the pursuit of a particular course of conduct. Many of the exhibits were offered by plaintiff, and received into evidence by the Court, for this limited purpose. This, of course, the defendants failed to mention.

Additionally, Rule 801(d) provides that a statement not hearsay (even where it meets the definition of Rule 801[c]) if it constitutes an admission by a party opponent as defined by Rule 801(d)(2). At trial the Court repeatedly inquired of the parties with respect to the applicability of this portion of the hearsay rule, in an effort to determine whether a particular statement was made by a person authorized to make the same concerning the subject, or was made by an agent or servant concerning a matter within the scope of his employment during the existence of the relationship. (Rule 801(d)(2)(C)(D), Fed. R. Evid.)

The initial determination by the Court as to the admissibility of evidence against a challenge of hearsay, and the Court's interpretation and application of Rule 801 as it relates to that particular objection, again involves the "wide and flexible discretion". *Tugwell v. A. F. Klaveness & Co., supra.* at p. 869. Upon a post-trial attack of Court's rulings relating to the admissibility of exhibits at trial, the appropriate standard under Rule 61 whether a "substantial right" has been invaded. Wright & Miller, *Federal Practice & Procedure,* §2885, p. 282. In this case defendants have in their brief lumped in footnotes scores of exhibits which were allegedly improperly admitted — no particular exhibit is individually discussed, and then the claim is made of "wholesale disregard of the specific requirements of the Federal Rules of Evidence***." (New Trial Brief, p. 17). Certainly, it would be most difficult if not impossible for the Court to make the inquiry required under Rule 61 within the perspective of the defendants' briefing technique.

If it is assumed, *arguendo,* that any of the challenged exhibits are ian fact "hearsay" within the purview of Rule 801(c) and (d), the evidence may nevertheless be admissible if deemed to come within one of the exceptions to the hearsay rule as outlined in Rules 803 and 804 Fed. R. Evid. Specifically, Rule 803 provides the "business records" ex-

ception which allows for admissibility, notwithstanding hearsay, based upon particular characteristics of the document. The basis for, and considerations relating to, the application of this exception to the hearsay rule as discussed by Judge Weinstein in his treatise:

> "In short, if the judge finds that the record may be helpful to the jurors and that they should be able to discount its untrustworthy aspects with adequate instructions, the judge should admit the record. Assessment of probative force should, whenever possible, be left for the jury. The jury's function should not be reduced by excluding relative evidence unless the court is reasonably assured that the result of the litigation will be less reliable if the evidence is revealed to the jury." *Weinstein's Evidence*, §803(7)[01].

Because of defendants' failure to relate the generalized objections asserted in the memorandum on a document by document basis, it is difficult to respond to their claim that certain of the exhibits did not meet the requirements of Rule 803(6). It suffices to say that the matter of the applicability of the business records exception was the subject of substantial briefing and oral argument at trial, and the Court applied the requirements of Rule 803(6), where necessary, to resolve objections relating to this issue. Defendants, in their New Trial Brief, present no additional argument. In fact, as indicated above, their present objections are even less compelling than when asserted at trial because of the failure to relate such objections to specific exhibits.

Finally, Rules 803(24) and 804(b)(5) provide that evidence which is not specifically covered by an exception to the hearsay rule may be admissible if it has "equivalent circumstantial guarantees of trustworthiness," based upon the following determination by the Court:

> "***(A) the statement is offered as evidence of a

material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

Plaintiff submits that the "fair opportunity" standard of this rule makes it particularly applicable to the case at bar. Each of the exhibits which defendants now dispute were presented to counsel for defendants approximately nine months in advance of trial, and accordingly defendants had a "fair opportunity" to meet such evidence at trial. This they failed to do.

In summary, plaintiff respectfully submits that a most adequate basis existed at trial for the Court to determine if the exhibits now questioned by the defendants met the requirements of the Federal Rules of Evidence. An incredible amount of briefing and oral argument was received by the Court, and defendants were given a fair opportunity to meet the evidence presented by the plaintiff, and to comment upon such evidence during the closing arguments to the jury. The contentions now advanced by defendants are contrary to the liberal policy of the Federal Rules with respect to the admission of evidence, and fail to recognize the broad discretion of the trial judge in making evidentiary determinations during the course of trail.

PROPOSITION X

DEFENDANTS' REQUEST FOR A NEW TRIAL ON THE BASIS OF THE AFFIDAVIT OF AN INDIVIDUAL WHO HAD BEEN DESIGNATED AS A TRIAL WITNESS, AND WHO WAS AVAILABLE TO TESTIFY AT TRIAL, SHOULD BE SUMMARILY REJECTED BY THIS COURT

Defendants assert that "[t]he damage verdict must be set aside because it was based upon evidence that plaintiff's counsel knew, or should have known, was untrue." This assertion clearly shows how desperate defendants are to manufacture error where no error exists. (New Trial Brief, p. 10). In support of this proposition it is alleged that the computer program utilized by Dr. Gup in his testimony, prepared by Mr. Fadel Iskander, contains "gross mathematical errors, thereby entitling defendants to a new trial." Defendants attach the affidavit of Edward F. Stafford, Assistant Professor of Business Administration in the College of Business Administration at the University of Oklahoma, to support the contention that mathematical errors exist. Attached to the Stafford affidavit are eight separate documents (not designated or offered by defendants at trial) which appear to represent certain computer print-out materials. In addition, defendants seek to buttress their new trial motion on this point by including, as an exhibit, a letter from counsel for Pennwalt to plaintiff's counsel.[15]

In essence, defendant's contention with respect to this ground for a new trial is as follows:

(1) The Iskander computer program, relied upon by Gup, contains "gross mathematical errors" as

---

[15]Plaintiff responded to the letter by counsel's statement in open court on March 23, 1979, and by filing on March 30, 1979 in open court, Plaintiff's Response to Defendants' Hand Delivered Letter of March 25, 1979.

demonstrated by the affidavit of Stafford with supporting materials attached to that affidavit;

(2) Plaintiff's counsel was put on notice of the alleged inaccuracies by a letter of March 25, 1979; and

(3) "Apparently, plaintiff's counsel failed to make the inquiries called for in the circumstances. If made, the results would have required of them a repudiation of the record of the damage evidence previously introduced." (New Trial Brief,p. 11).

It is understandable that defendants' discussion of this ground for a new trial contains no citation whatsoever to legal authority. (*Id.* pp. 10-12) The affiant, Professor Stafford, was designated by defendants as a witness on the witness list filed of record and served upon counsel on March 19,1979.[16]

Defendants' incredible approach to this issue not only contravenes the legal principles underlying Rule 59 motions, but plainly defies common sense. If defendants belief that an error existed in the Iskander program, it was their responsibility to call the witness which they had designated, as part of their case, to so testify. This they failed to do.

It is clear that a party may, as a ground for a new trial, assert the existence of newly discovered evidence. Wright & Miller, *Federal Practice & Procedure,* §2808, p.

---

[16]Defendants filed their witness list and served the same upon counsel *subsequent* to the testimony of Dr. Gup. No claim is made by defendants that Professor Stafford was unavailable to testify, for any reason, as a live witness in the case. Rather, defendants seek to justify their failure to call the witness as follows:

> "It is not up to opposing counsel to call a witness to contradict the untrue evidence and then hope that the new evidence, rather than the untrue evidence, will be accepted by the jury, and that the jury will not be confused. This is particularly so when, as here, we are dealing with black-and-white propositions of mathematical certainty — not a matter about which experts might debate." (New Trial Brief, p. 12)

54. In determining the legal sufficiency of such a claim the court is guided by the same standards applicable to motions submitted under Rule 60(b)(2) F.R.Civ.P.[17] One essential element of the claim presented under Rule 59 or 6)(b)(2) is that the moving party was "excusably ignorant of the facts despite using due diligence to learn about them." Wright & Miller, *Federal Practice & Procedures,* §2808, pp. 55-57. *See Valmont Industries, Inc. v. Enresco, Inc.*, 446 F.2d 1193 (10th Cir. 1971); *McCullough Tool Co. v. Well Surveys Inc.*, 343 F.2d 381 (10th Cr. 1965); *Jamco, Inc. v. Carlson*, 274 F.2d 338 (10th Cir. 1959). In this case defendants had been furnished with the Iskander program months prior to trial, Dr. Gup testified on the fifth day of trial and referred to the Iskander program at that time, and defendants *subsequently* listed Professor Stafford as a witness. For some tactical reason, perhaps to avoid the cross-examination of counsel, defendants then did not call Dr. Stafford as a witness at trial. Instead, they chose to argue the matter to the court and jury, without the benefit of any evidence in the record from their purported witness; and served upon plaintiff a letter containing self-serving declarations and threats to counsel. Now, we have a post-trial affidavit of the witness Stafford. There simply is no authority for the course upon which defendants now embark. The cases which plaintiff cites under Rule 59 and 60(b)(2) require this Court to reject defendants' belated proffer of "evidence." To do otherwise would not only be a miscarriage of justice, but would be gross error striking down the fundamentals of our judicial proceedings.

---

[17] Rule 60(b)(2) provides as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: *** (2) newly-discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

PROPOSITION XI

THE COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANTS' MOTION TO STRIKE THE TESTIMONY OF SCOTT CAMPBELL

Mr. Scott Campbell ("Campbell") an accountant with Main Lafrentz & Company, Tulsa, Oklahoma, testified at trial with respect to the following matters:

(1) DuPont's list prices for refrigerant gases 12 and 22 during the period of time 1969-1972;

(2) The actual prices charged by DuPont for these products to Waugh Bros. and Tersco (taking into consideration various forms of discounts reflected on DuPont documents) during this period of time;

(3) DuPont's statement of its costs with respect to the production and distribution of R-12 and R-22.

Campbell testified from certain charts which he had prepared and which reflected the list pricing, off-list pricing and DuPont's costs — all from documents provided by DuPont. The issue raised by defendants in connection with the motion for new trial is that error was committed by the Court in failing to strike the Campbell testimony in view of his statement upon cross-examination that certain areas of his testimony and portions of the charts were "inaccurate and misleading." (New Trial Brief, pp. 13-14). Also, defendants aver that the error was compounded by the conduct of plaintiff's counsel in suggesting to the jury that the information supplied by DuPont, upon which the charts were prepared, contributed to any inaccuracies. (Id.)

Three initial points should be made with respect to this matter: (1) each and every document utilized by Mr. Campbell, a Certified Public Accountant, in connection with the preparation of his testimony and charts was supplied by DuPont during discovery; (2) it was defendants,

not plaintiff, that moved the charts prepared by Mr. Campbell into evidence; (3) counsel for DuPont in argument to the Court on the motion for directed verdict, and later to the jury upon closing argument, took great time (and apparent delight), in demonstrating to the court and jury how he effectively "destroyed" the testimony of this witness. Of course, as the Court indicated at the bench conference upon DuPont's motion to strike the Campbell testimony, the weight to be given to such evidence is a matter for the jury[18] and counsel for DuPont utilized the charts extentively in its closing argument. Furthermore, counsel for other defendants, in their closing remarks, improperly referred to other of plaintiff's exhibits, not related to the Campbell testimony, as "Campbell documents." In fact, defendants' counsel demeaned this witness in every conceivable way in their arguments to the jury.

The comments of counsel for plaintiff in closing argument with respect to DuPont's failure to provide costing information, which it was under an obligation to furnish, is supported by the record. Pl. Exh. No. 1355 represents DuPont's answers to plaintiff's third set of interrogatories which requested specific costing information. The information requested was the cost per pound pre-paid freight, Houston, Texas, for R-12 and R-22 in various sizes of containers on each of the following dates: January 1, 1969;

---

[18]The following colloquy occurred at the bench conference:

"THE COURT: I think that maybe your suggestion is that I say to the Jury what you say I should say to the Jury.

But should I do this, then I'm ipso facto, and we take the question of the fact away from the Jury.

This is for the Jury to decide.

MR. DYM: I'm sorry, Your Honor, I didn't mean to interrupt.

THE COURT: This is for the Jury to decide.

I think they will have very little trouble deciding what to believe and not to believe." (Campbell, Tr. 933)

September 1, 1969; January 1, 1970; January 1, 1971; April 1, 1971; January 1, 1972; April 1, 1972; October 1, 1972; January 1, 1973; and May 25, 1973. (Pl. Exh. No. 1355, Interrogatory No. 1, p. 1). Interrogatory No. 2 requested DuPont's direct cost of product for R-12 and R-22 on the same dates indicated in Interrogatory No. 1. Interrogatory No. 3 requested DuPont's selling expense and general and administrative expense per pound, pre-paid freight, Houston, Texas on January 1, 1969 for refrigerant grades R-12 and R-22 in eight cylinder sizes. Interrogatories 4 through 12 asked that DuPont provide the same information requested in Interrogatory No. 3 for the dates previously provided commencing with September 1, 1969 to January 1, 1973. DuPont chose to provide plaintiff with "year to date costs" computed as of March, 1969, September, 1969, March, 1970, March, 1971, January, 1972 and April, 1972, October, 1972, January, 1973 and May, 1973. (Pl. Exh. No. 1357). Incredibly, counsel for DuPont then fiercely cross-examined Mr. Campbell on his use of "year to date" costs — when plaintiff had never requested such information in its interrogatories. (Campbell, Tr. 895). However, this was *all* DuPont provided.[19]

DuPont further complains that Mr. Campbell did not know whether DuPont actually sold the products reflected by his charts to the customers there indicated or at what prices the products were sold. Upon cross examination Mr. Dym inferred that Mr. Campbell's testimony related to only "hypothetical sales" and this point was argued extensively to the court and the jury. In fact, counsel's suggestions to the witness and the jury are demonstrably misleading based upon the actual DuPont documents utilized by Mr. Campbell. The off-list pricing to Waugh Bros. and Tersco was plotted by Mr. Campbell on the

[19] Mr. Campbell did not determine DuPont's costs as defendants attempt to suggest. He plotted their costs. (Campbell, Tr. 868)

basis of DuPont's "Competitive Price Adjustment" forms ("CPA's") provided by DuPont during discovery. With respect to each customer, including Tersco and Waugh Bros., these forms include, *inter alia,* DuPont's current selling price, the type of price adjustment requested, the anticipated result of the adjustment, the percent penetration of each supplier, *including DuPont,* with respect to that customer; and the total annual refrigerant pound volume sold by the customer. (See Pl. Exh. Nos. 1179-1185, 1189, 1192). These exhibits were received into evidence and furnished to the jury. Note, for example, the second page of Pl. Exh. No. 1180 wherein it is shown that DuPont is selling Tersco at a one and one-half cents per pound discount on less than 7,000 pounds, that DuPont has 35% of Tersco's total annual refrigerant pound volume of 700,000 pounds. A three cent per pound discount on any quantity purchased is requested and approved. The question then, for the jury, was whether this document reflects "hypothetical sales at hypothetical prices." The first page of Pl. Exh. No. 1181 shows that DuPont was selling to Tresco at three cents a pound off on less than truckload purchases, giving 5%, 90-day terms, a 10% finder's fee on ton tanks of all refrigerants, 5% year-end rebate on R-22, and a 3% year-end rebate on all other refrigerants in all sized containers other than bulk and tons.[20] This exhibit further reflects that at that time, March of 1971, Tersco had a total annual refrigerant volume of 100,000 pounds, and DuPont had 20% of that business. Are these hypothetical sales at hypothetical prices?

As an example of DuPont's pricing of products to

---

[20]It should be recalled that Campbell testified that with respect to the large quarterly or year-end rebates (cash payments) given to Tersco and Waugh Bros., he was unable to quantify such amounts and therefore DuPont's actual selling price as reflected on the charts did not take these payments into effect. (Campbell, Tr. 852-853)

Waugh Bros., let us examine Pl. Exh. No. 1192. There DuPont indicates that its current selling price was list with standard terms of 2%-30 days. This exhibit disclosed that the total volume of refrigerants purchased by Waugh Bros. at that time was 300,000 pounds and DuPont had 35% of the business. Pl. Exh. No. 1194 shows a current DuPont selling price to Waugh Bros. as reflected by its list of December 29, 1972. DuPont is reflected as a 40% supplier of the total 800,000 pounds representing Waugh Bros.' annual volume at that time.

The contention of counsel for DuPont that DuPont's CPA's could be considered to reflect only "hypothetical sales at hypothetical prices" was a matter for the jury's consideration, in accordance with the Court's instructions. In fact, plaintiff submits that the CPA's did not show "hypothetical" transactions.[21]

The legal principles applicable to the Court's rulings with respect to the admission or exclusion of evidence during trial, as discussed in other portions of this brief, are pertinent here. The court's discretion is "wide and flexible" and a new trial will only lie where "a substantial right" has been invaded. Wright & Miller, *Federal Practice & Procedure,* §2885, p. 282, Rule 61 F.R.Civ.P. The Court, upon considering Mr. Campbell's testimony, and the motion presented by DuPont following his testimony, properly concluded that the jury would evaluate the witness' credibility, and the weight of the evidence. The Court's ruling in this regard, in view of the circumstances related above, was perfectly proper, and clearly does not constitute reversible error.

---

[21] It is interesting to observe that DuPont did not seek to prove up its theory of "hypothetical transactions" by calling a witness from DuPont to testify as to the sales, or lack of sales, to Tersco and Waugh Bros. during the period 1969-1972.

CONCLUSION

The defendants were successful in preventing the admission into evidence of many of plaintiff's exhibits most damaging to defendants, such as the diaries of DuPont executive Robert Glover and the approximately 140 other exhibits offered by the plaintiff, but not admitted into evidence by the Court. The strict and constrained interpretation by the defendants of the Federal Rules of Evidence which prevailed in arguments before the Court, resulted in a record that is error free insofar as the plaintiff's position is concerned. There is absolutely no error by the Court in this record with regard to any of the Court's decisions admitting exhibits and testimony introduced by the plaintiff. If there be error, it would be in the decisions excluding exhibits and testimony from the evidence.

In addition, the Court strictly construed the rules with regard to the admission of depositions, resulting in the elimination of the Russell Broeckelmann and the James V. Jones depositions and thus the exclusion from the evidence of the defendants' "dumping" of refrigerant gas in the Houston market to drive Daiflon out of business. Nevertheless, the evidence admitted by the Court is still much more than sufficient to justify and support the allegations of the plaintiff and the special verdict of the jury. The defendants failed in their endeavor to exclude all such evidence.

The questionable tactics of defendants' counsel in closing arguments to the jury also failed to prevent the jury from returning the special verdict in favor of the plaintiff. Again, if there were error committed, it was against the plaintiff and not the defendants, particularly the statements to the jury, "You know, a violation of the antitrust laws is a criminal violation" and that the big buildings of the big companies are filled with people ". . . and what they are saying that the people committed a crime," all contrary to the Court's admonition in the

beginning of this case that any "smack" of any criminal reference was out.

The positions of the defendants throughout the trial were analogous to that of a chameleon, constantly changing in an endeavor to accomplish their objectives of excluding plaintiff's evidence. On the one hand they would endeavor to exclude an exhibit of the plaintiff when it was clearly signed, dated, addressed and properly identified as a company (Allied) communication, and on the other hand they would endeavor to introduce a mere unsigned and undated note written by one person to himself (Robertson). This inconsistency and "double standard" by the defendants was evidenced throughout the trial and even now in their briefs as opposed to their closing arguments, portions of which were as follows:

> MR. ATHENS: "I speak quite earnestly when I say that you are probably the most attentive Jury that I have had the pleasure of appearing before . . ."
>
> MR. MEYERS: ". . . let me tell you that on behalf of Union Carbide, we couldn't feel more comfortable under the circumstances being in this courtroom . . . and after sometime tomorrow being in your hands. We are very comfortable in that circumstance . . ."
>
> MR. STURDIVANT: ". . . we discussed the fair trial that we feel like we have received . . ."
>
> MR. DYM: ". . . you are the judges of the facts in this case."
>
> MR. KOLOWRAT: "I do, of course, want to endorse very much what other counsel on both sides here have said in expressing their appreciation to you for your patience and your attentiveness . . . I feel very comfortable and welcome . . . to . . . have you decide the case of my client, our client, Pennwalt Corporation . . . we picked you as the fairest jurors that we saw. We are well satisfied with you . . . common sense. That's what you've got. That's

what you've got. That's what will help you decide this case."

MR. HAYES: "I want to say to you at this point that I think I can with complete assurance say to you that neither his Honor here, or any other Judge in any other case and to any other jury, will ever tell jurors that they must ignore or put aside or disregard their God-given ability to reason and to resort to just plain common sense . . . you can just resort to reason and common sense, and you are going to come up with a verdict about which no one can complain, and won't."

The jury heard all of the evidence and was very patient and attentive during the entire four week trial. The jury exercised its God-given ability to reason and to resort to just plain common sense in arriving at its just and reasonable special verdict. *The defendants lost in a fair trial.*

WHEREFORE, the defendants' Motion for Judgment Notwithstanding the Verdict and the defendants' Motion for New Trial should be overruled.

Respectfully submitted,

PRICHARD, NORMAN & WOHLGEMUTH
B. HAYDEN CRAWFORD
FRANK GREGORY

By /s/ B. Hayden Crawford
By Hayden Crawford
1714 First National Tower
Tulsa, Oklahoma 74103

By /s/ Joel L. Wohlgemuth
Joel L. Wohlgemuth
1100 Philtower Building
Tulsa, Oklahoma 74103

By /s/ Frank Gregory
Frank Gregory
1714 First National Tower
Tulsa, Oklahoma 74103
Attorneys for the Plaintiff

[Attachments deleted in printing.]

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAIFLON, INC.,

Petitioner,

vs.

THE HONORABLE LUTHER BOHANON,
Judge of the United States
District Court for The
Western District of Oklahoma,

Respondent.

PETITION FOR WRIT OF MANDAMUS AND/OR
WRIT OF PROHIBITION

Respectfully submitted,
Joel L. Wohlgemuth
B. Hayden Crawford
Frank Gregory
Attorneys for the Petitioner
Daiflon, Inc.

PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION

The above-named petitioner, Daiflon, Inc., ("Daiflon"), herein applies, pursuant to Section 1651, Title 28, United States Code, and Rule 21(a) of the Federal Rules of Appellate Procedure, for a writ of mandamus, or in the alternative, a writ of prohibition, directed to the above-named respondent, The Honorable Luther Bohanon, Judge of the United States District Court for The Western District of Oklahoma. In support of this application petitioner states:

I

Order and Opinion Below

On the 14th day of May, 1979 respondent duly made and entered an order granting a new trial to all defendants in *Daiflon, Inc. v. Allied Chemical Corporation*; *E. I. DuPont De Nemours and Company*; *Kaiser Aluminum & Chemical Corporation*; *Kaiser Aluminum & Chemical Sales, Inc.*; *Pennwalt Corporation*; *Racon Incorporated*; *and Union Carbide Corporation*, No. 72-C-483-B, In The United States District Court For The Western District of Oklahoma. Such order is set forth in full as Exhibit "A," which Exhibit "A" is attached hereto and by reference incorporated herein.

II

Statement of Facts

Daiflon, Inc. was organized and incorporated in 1969 for the purpose of importing refrigerant gas from Japan, repackaging that gas, and reselling it in the non-automotive replacement market. The defendants are the domestic manufacturers of refrigerant gas. During the period 1969-1972, defendants marketed refrigerant gas in the various size cylinders through "full line" air conditioning and heating wholesalers, who then resold the gas (in cylinders) to servicemen and contractors. Daiflon

marketed its gas to any prospective purchaser regardless of their level in the chain of distribution; therefore, Daiflon competed directly with defendants for some wholesale accounts, and further competed directly with other of defendants' wholesalers for retail accounts. Daiflon contended that on March 15, 1971 defendants reduced the prices of refrigerants by 13%, and again lowered prices dramatically (this time only on the two grades of refrigerant sold by Daiflon) in March of 1972. Daiflon ceased business operations on October 12, 1972, and defendants thereafter immediately increased prices to the levels prevailing prior to the 13% reduction of March 15, 1971.

On July 12, 1972 Daiflon commenced the action in the court below charging defendants with violating the Sherman Antitrust Act, 15 U.S.C. §§1 and 2. Daiflon stated that defendants had entered into an unlawful price fixing conspiracy in order to set prices, temporarily, at a low level to exclude Daiflon from the market in violation of §1 of the Sherman Act, 15 U.S.C. §1. Daiflon further stated that defendants conspired to monopolize the non-automotive refrigerant gas replacement market, and that the defendant DuPont attempted to, and did in fact, monopolize that market during the period of Daiflon's operations, 1969-1972. The complaint alleges that Daiflon's losses and the destruction of its business were caused by defendants' anticompetitive conduct, and that total damages exceeded $3,000,000.00.

Following two years of litigation, which involved discovery in several states, the trial judge dismissed the action with prejudice pursuant to the provisions of Rule 37(b)(2)(C) F.R.Civ.P. for Daiflon's alleged failure to properly answer a single interrogatory in defendants' second set of interrogatories.[1] *Daiflon, Inc. v. Allied Chemical Corp.*, 64 F.R.D. 690 (W.D.Okl. 1974). On

[1]No hearing was held by respondent on the motion to dismiss.

April 16, 1976 this Court reversed the decision of the district court and remanded the case for further proceedings in accordance with its decision. *Daiflon, Inc. v. Allied Chemical Corp.*, 534 F.2d 221 (10th Cir. 1976). Defendants thereafter unsuccessfully sought rehearing (denied May 24, 1976) and petitioned the United States Supreme Court for a writ of certiorari. On October 12, 1976 defendants' application for certiorari was denied. However, the respondent judge did not commence trial on the case until March 6, 1979.

Prior to the commencement of trial, on March 2, 1979, a hearing was held on a motion in limine which defendants had filed relating to the admissibility of evidence regarding defendants' prior involvement in government civil and criminal antitrust proceedings. At that hearing the following colloquy occurred between the district judge and Daiflon's counsel:

> THE COURT: You don't mean to say that they've got to say to the jury, "Well, we can't tell you we are complying with the antitrust laws."?
>
> MR. CRAWFORD: No, your Honor.
>
> THE COURT: That's what it amounts to. If they don't say, "We are", the jury will have the idea, "Well, you are not. You didn't say you are complying with it so we have to assume you are not."
>
> But you say that for them to say this you've got a right to put in the nolo contendre documents. I don't think you would be.
>
> MR. CRAWFORD: Well, if the Court please —
>
> THE COURT: (Interposing) They go off on the proposition that they are complying. If they didn't, they'd probably settle with you.
>
> (Transcript of Hearing on Defendants' Motions, March 2, 1979, p. 11)

Following that exchange, the Court and the parties continued to discuss issues raised by the motion in limine,

together with the situation regarding exchange of exhibits and deposition testimony. At the conclusion of the hearing the Court ordered Daiflon to furnish defendants, by start of trial (March 6), page and line references to the deposition testimony to be read by Daiflon in its case in chief. Daiflon complied with the Court's order.[2] At trial Daiflon called twenty-five witnesses, and approximately 276 of its exhibits were admitted into evidence. The Court excluded approximately 423 exhibits offered by Daiflon. At the conclusion of Daiflon's evidence defendants jointly moved for a directed verdict which was not granted. Following presentation of argument on the motion for directed verdict, the court stated with respect to the claim for damages that this was an issue "***for the jury to decide, as I view it at this state of the trial of this case." (Transcript of Trial Proceedings and Testimony had before the Honorable Luther L. Bohanon on March 20, 1979, p. 53). The district court made no comment whatsoever at that time in connection with the evidentiary problems subsequently referred to in the order granting the motion for new trial.

The defendants then proceeded with their case which involved the testimony of five witnesses and the introduction of approximately 100 exhibits. The district court admitted, without exception, all exhibits offered by defendants. While defendants had previously filed a witness list designating approximately twenty witnesses and 14 depositions, including various representatives of each of the defendant corporations, no officers or employees of

[2]At the March 2 hearing the Court indicated that a continuance would be ordered in the event that Daiflon did not comply with the order requiring additional designation of deposition testimony. It should be noted here that the defendants did not seek, either orally or in writing, a continuance of the trial on or before March 2 or during the course of trial for any reason. There was no discussion of a possible continuance prior to the start of trial on March 6.

defendants were called as witnesses at trial, except a computer programmer employed by the defendant Union Carbide. The testimony of this witness, Gerald McHugh, was merely for the purpose of authenticating a computer print-out, which was subsequently offered and received into evidence as an exhibit.

Defendants presented no evidence in connection with Daiflon's claim of loss of profits, loss of capital investment, debt position or going concern value.[3] At the conclusion of the evidence the defendants unsuccessfully renewed their motion for directed verdict.

On March 29, 1979 the case was submitted to the jury on a Special Verdict form as requested by defendants.[4] Following approximately nine hours of deliberation the jury returned its Special Verdict and made the following findings: That all defendants (Allied Chemical, DuPont, Kaiser, Pennwalt, Racon and Carbide "inclusive") conspired with each other to violate the federal antitrust laws (Special Verdict Findings 1 and 2); that DuPont's share of the relevant market during the period 1969-1972 exceeded 50% (Special Verdict, Finding 3); that DuPont had the specific intent to acquire monopoly power and that there was a dangerous probability that it would ultimately do so (Special Verdict, Finding 4); that DuPont had monopoly power during the period 1969-1972 (Special Verdict,

---

[3]Daiflon proved its damages through the testimony of its President, Richard E. Carter, its Vice President, R. D. McDonald, and the expert testimony of Dr. Benton Gup, the Professor and holder of the University of Tulsa Chair of Banking and Finance. Dr. Gup was formerly a staff economist for the Federal Reserve Bank in Cleveland, Ohio, is the author of several books and articles, and is an officer of the Financial Management Association, a large professional financial management group.

---

[4]"The Special Verdict, in our judgment, accurately reflects the instructions given to the jury." (Defendant's Objections to Plaintiff's Proposed Amendments to Special Verdict, filed March 29, 1979.)

Finding 5); that such monopoly power was willfully and unlawfully acquired (Special Verdict, Finding 6); that Daiflon's business and property losses were proximately caused by defendants' unlawful conspiracy *and* DuPont's individual monopolization efforts (Special Verdict, Findings 7 and 8); that the plaintiff proved by a preponderance of the evidence the reasonable value of its business and property losses, and that its evidence was not unduly speculative (Special Verdict, Finding 9); and that the reasonable value of Daiflon's business and property losses was Two Million Five Hundred Thousand Dollars ($2,500,000.00). The Special Verdict is set forth in full as Exhibit "B," which Exhibit "B" is attached hereto and by reference incorporated herein.

Accordingly, the jury determined each and every issue presented in favor of Daiflon and against defendants. On April 2, 1979 (which was the Monday following the jury verdict of Friday afternoon, March 30) Daiflon submitted to the Court a proposed judgment to be entered in accordance with the provisions of Rule 58(2) F.R.Civ.P. The proposed judgment is set forth in full as Exhibit "C," which Exhibit "C" is attached hereto and by reference incorporated herein. The judgment was provided by the Clerk of the Court to counsel for defendants for approval as to form. No objection was made by defendants. Despite the requirement of Rule 58(2) F.R.Civ.P. for prompt approval of the form of judgment, no judgment was entered until April 9, 1979. On April 9 the Court entered its judgment, which essentially followed the provisions of Daiflon's proposed judgment, with the significant exception that the Court's judgment awarded Daiflon the sum of $2,500,000.00 rather than the trebled amount of $7,500,000.00. The Court's judgment is set forth in full as Exhibit "D," which Exhibit "D" is attached hereto and by reference incorporated herein. The Court did not circulate its judgment to counsel for Daiflon or defendants

for comment or approval as to form.

On April 12, 1979 Daiflon filed a Motion to Include Treble Damages in Judgment Pursuant to 15 U.S.C. §15 together with a memorandum brief in support thereof. No response was filed by defendants to the motion, and no action was taken by the Court with respect to the motion.

On April 18, 1979 Daiflon filed its Bill of Costs in the amount of $19,220.17 . However, the clerk did not set a date to tax costs, and no action was taken by respondent on the Bill of Costs.

Within the time provided by Rules 50 and 59 F.R.Civ.P. the defendants moved for judgment notwithstanding the verdict and for a new trial. The Motion for Judgment n.o.v. was premised upon the alleged failure by Daiflon to produce "substantial" evidence of conspiracy, attempted monopolization, monopolization, impact, or damages. The Motion for New Trial was essentially based upon the proposition that the jury verdict was excessive, contrary to the law and evidence, and further that the Court erred in "***admitting into evidence highly prejudicial written statements which failed to meet the standards for admission under the Federal Rules of Evidence." The Motion for Judgment Notwithstanding the Verdict and for New Trial is set forth in full as Exhibit "E," which Exhibit "E" is attached hereto and by reference incorporated herein. The defendants filed briefs in support of their alternative motions, and Daiflon responded with its brief in opposition.

On April 23, 1979 the district court entered an order setting for hearing on May 14, 1979 Daiflon's Motion to Fix Attorneys' Fees, and defendants' alternative motions under Rules 50 and 59. However, at an impromptu hearing on May 11 (attended only by counsel for Daiflon and DuPont, with no court reporter present) the Court stated that Daiflon's Motion to Fix Attorneys' Fees could not be heard on May 14 as originally scheduled.

Following the presentation of oral argument by the parties on May 14, 1979 the Court orally delivered its order denying the motion for judgment n.o.v. and granting the motion for new trial. (*See*, Exhibit "A".)

The Court stated, at the outset, that it could not, under any circumstances, grant judgment n.o.v., "it would just not fit this case at all." (Exhibit "A," p. 2) However, the Court held that the jury verdict must be vacated and a new trial granted:

> "The Court must and does grant a new trial.
>
> I say this to you, Mr. Crawford, you are an exceedingly good lawyer, and you make a lot out of things that are really not important, as I view it from this evidence; but you had this jury in the palm of your hand almost from the beginning.
>
> The Court finds and holds that the defendants were put at a great, great disadvantage, when you march into court on the day of trial, and I believe it was on Friday, and the time before the trial the defendants were complaining about not knowing what your evidence was going to be, what your documents were going to be.
>
> Now the Court ordered the defendants, and they worked with you in good faith, and they opened their bowels and bared their chests and you got out of their files literally hundred of exhibits. They were kept in the dark as to which ones of these you were going to use until Friday before the trial, and then the Court made certain orders, and we started the trial with literally dozens and dozens of exhibits that were not agreed to; and the Court had been open during all this period of time, after it came back, for the purpose of settling any issue; and the defendants came to me and said, "We are not getting this, we are not getting that out of the plaintiff, and what these exhibits are going to be." (Exhibit "A,", pp. 2-3)

The Court then indicated that while he appreciated the work of the jury: "They don't understand about this gas business." (*Id.*, p. 4)

The Court then addressed the award of damages:

> "When you consider the verdict, two and a half million dollars — when you consider that this company started out with a capital investment of $200,000 to get into a business that runs into the millions, it would be just like me going out here and saying, 'I'm going to go into the oil business, and I'm going to get a block and drill a well, on $100,000.
>
> Why, you couldn't even get started.
>
> The $200,000 that the plaintiff had wasn't enough to really get them started into breaking into this business, as long as the defendants were concerned about their business.
>
> The defendants had a perfect right to meet competition, and for them not to meet competition is to deny them free enterprise." (*Id.*, p. 5)

* * *

> "What are the actual damages? There is nowhere it reaches $2,500,000.00" (*Id.*, p. 6)

However, the court later indicated that:

> "The verdict may be more under new evidence than that allowed. It may be less." (*Id.*, p. 8)

The district judge stated that he intended to have a conference "***where every exhibit to be used by either side will be passed on before we ever call a jury." (*Id.*, p. 6) Respondent then indicated that the conference could not be in the month of May since he was moving his quarters but that when the conference did occur:

> "***we are going over every exhibit. We are going to match it with the Rules of Evidence, and if it is admissible, we are going to put it over here; if it is not admissible, we are going to put it over here, so to

speak. (*Id.*, p. 6) . . . and that these exhibits will not be a headache to the Court." (*Id.*, p. 8)

The district judge stated that it would be necessary to have additional time for further discovery:

> "I think perhaps we should either pass upon the great volume of exhibits before we go into further discovery, or vice versa. I don't know which would be the best — whether the egg before the chicken or the chicken before the egg; but you've got to have some discovery." (*Id.*, p. 7)

As of the date of the filing of this petition, no further action has been taken by the district court, and no written order has been entered with respect to the Court's rulings on the post-trial motions.

III

Statement of Issue Presented

The issue presented herein is as follows:

Whether the district judge's order granting a new trial is characteristic of an erroneous practice likely to reoccur, thereby justifying the extraordinary relief sought by petitioner.

IV

Statement of Relief Sought

Petitioner herein seeks to have this Honorable Court of Appeals review on writ on mandamus and/or prohibition the district court's order granting a new trial and to make and enter a judgment reinstating the verdict of the jury with treble damages as provided by law, and prohibiting the district judge from conducting further proceedings except as may be necessary to enter an appropriate judgment, determine the costs taxable to defendants, and to set a reasonable attorney's fee to be included in the judgment, as prescribed by law.

V

Reasons Why Writ Should Issue

The reasons the writ requested herein should issue are as follows: The order complained of presents a gross abuse of discretion which is not only characteristic of respondent's unwillingness and/or inability to deal fairly and expeditiously with the issues presented and to afford petitioner its Seventh Amendment right to trial by jury, but also portends of a third unnecessary trial, should petitioner survive the pre-trial proceedings, discovery and second trial presently perceived by respondent. Daiflon respectfully submits that, in evaluating the question of whether extraordinary circumstances exist in this case to justify intervention by mandamus and/or prohibition, it is necessary to bring into focus the commercial and legal realities presently existing as a consequence of respondent's order. This action was filed nearly seven years ago by a small corporation comprised of three individual stockholders. The expenses of litigation have, for petitioner, been astronomical. With additional discovery, and a second trial of undetermined length, the expense of further proceeding may be prohibitive. However, Daiflon anticipates that these facts alone may be insufficient to justify the relief sought. Nevertheless, when viewed within the perspective of the conduct and rulings by the respondent during the course of this litigation, and within the perspective afforded by the district court in connection with future proceedings, the circumstances presently existing are extraordinary.

The proposition that the order granting a new trial is demonstrative of erroneous practices which are likely to reoccur is supported by (a) the substance of the order itself; and (b) the record created by respondent prior to entry of the order.

In 1976 this Court recognized that respondent committed error in imposing the "drastic sanction" of dismissal of Daiflon's claims. 534 F.2d at 227. Accordingly, the

case was reversed and remanded. As previously indicated defendants proceeded to seek certiorari which was denied on October 12, 1976. The case, which at that point was over four years old, was not tried until March of 1979. Prior to the commencement of trial, on March 2, 1979 the respondent clearly expressed his predilection with respect to the merits when he indicated that if defendants were not complying with the antitrust laws "*** they'd probably settle with you." (Hearing on Defendants' Motions, March 2, 1979, p. 11) During the same hearing the Court threatened a mistrial:

> "Well, I want to tell you lawyers right now that the the way this case is prepared for trial indicates very strongly to me that before it's over I am going to have to call a mistrial, and have to fix another date and get this thing in shape to have a fair trial. You are going to have to have a fair trial. If you are not, why then I am not going to go through a trial and have it go to the Circuit if it goes up there showing on its face that I did not conduct a fair trial." (*Id.*, pp. 53-54)

Contrary to the Court's observations with respect to the exhibits originally designated by Daiflon for introduction prior to trial, and those actually offered at trial (a total of 276 exhibits were admitted), there is absolutely no basis in the record for the Court's post-trial action in setting aside the jury verdict and granting a new trial for the purported reason that *unspecified* exhibits were erroneously admitted. In fact, the record in this case reflects that Daiflon prepared its case in strict observance of all of the Court's pre-trial orders, and the problem, if any, created at the trial was due to defendants' successful assertion of objections which were clearly waived under the pre-trial orders. In order that this petition will not be burdened with a lengthy recitation regarding the pre-trial designation of exhibits, and the introduction of those exhibits at trial, Daiflon attaches hereto a copy Proposition IX of its

Response to Defendants' Motion Notwithstanding the Verdict and for New Trial, which was filed of record May 10, 1979. Proposition IX of Diaflon's Response is set forth in full as Exhibit "F," which Exhibit "F" is attached hereto and by reference incorporated herein.

In this regard, it should be noted that defendants, in their motion for new trial and supporting brief, do not discuss their evidentiary objections to any single exhibit. The respondent, in his order granting a new trial, does not identify a single exhibit which may have been erroneously introduced. Rather, the Court's ruling merely relates to Daiflon keeping defendants "in the dark" (Exhibit "A," p. 3); "dozens and dozens of exhibits that were not agreed to;" (*Id.*) and that respondent "didn't know what I was talking about, because whether or not these exhibits come within the pale of the rule or not, why there is no proof to show it. *** They were just thrown in evidence." (*Id.*, p. 8) The only guideline or indication which respondent has given with respect to the procedure to be followed in the future is that he intends to determine the question of admissibility with respect to each exhibit to be offered *in advance of trial.* (*Id.*, pp. 6-7) This, of course, represents a wholly unfair approach in that the court will be ruling on exhibits in advance of trial without the benefit of evidence to be presented at trial which will clearly bear upon those determinations.

The order granting a new trial does not refer to the comprehensive written order filed by the judge on March 22, 1979 wherein rulings were made with respect to all of Daiflon's disputed exhibits. Such order is set forth in full as Exhibit "G," which Exhibit "G" is attached hereto and by reference incorporated herein. As reflected by that order, the Court admitted 121 of Daiflon's disputed exhibits while denying admission to 103 disputed exhibits. Moreover, there were 155 of Daiflon's exhibits which were admitted by agreement prior to the entry of the order of

March 22. The court's observation that exhibits were "just thrown in evidence," and were "a headache to the defendants" is just not accurate. (Exhibit "A," p. 8)

It was counsel for Kaiser who had been endeavoring to convince the Court that "the defendants were complaining about not knowing what your (Daiflon) evidence was going to be, what your (Daiflon) documents were going to be." (Lines 5-7, p. 3, Exhibit "A"). In view of the pleadings, the orders of respondent and the record, it is unbelievable that the trial court would accept such an argument, which is further indication of respondent's unchanging attitude in favor of the defendants.

The argument of counsel for Kaiser is without merit, has not been made in good faith, and is totally contrary to the record. With regard to the depositions, the following are the facts:

(a) On May 15, 1978 the district court entered its Pre-Trial Order. As an addition to the Pre-Trial Order the court referred to a letter dated May 10, 1978, from Coleman Hayes (counsel for DuPont) which recited in paragraph 3(b) thereof:

> "Within 30 days after entry of the Pre-Trial Order, plaintiff will provide defendants with a list of the witnesses it intends to call and those portions of depositions which it intends to read into evidence. Thereafter, within 50 days after receipt of this list, each defendant will provide the plaintiff with its list of witnesses, portions of depositions which it intends to read into evidence, and any additional portions of any deposition designated by plaintiff which that defendant desires to have read into evidence."

(b) On June 26, 1978 the court entered its Supplement to Pre-Trial Order and provided that "on August 7, 1978, the plaintiff will designate and provide the defendants with a document reflecting, by page and line number, all deposition testimony to be used by it at trial."

(c) On August 1, 1978 the plaintiff filed its Designation of Deposition Testimony which set forth the name of the witnesses and the pages of the depositions "which may be introduced at trial."

(d) On August 7, 1978 the court entered its Suggested Trial Procedure and stated in paragraph 1: "Plaintiff and defendant counsel shall reduce the deposition testimony to typewritten form, setting out the questions and answers of the witness that counsel believes to be pertinent and relevant as to each deposition."

(e) On August 15, 1978, James M. Sturdivant (counsel for Kaiser) wrote to counsel for plaintiff, a copy of such letter being attached hereto as Exhibit "H," and referred to a telephone call by Coleman Hayes on that date to the Court and stated: "The defendants are agreeable to photocopying the applicable portions of depositions which are to be read at the trial in lieu of putting them in 'typewritten form'."

(f) On August 17, 1978, counsel for Daiflon wrote to the court, a copy of such letter being attached hereto as Exhibit "I," and advised the court: "It is my understanding from Mr. James M. Sturdivant of the defense attorneys that the ten days from August 7 has been extended to August 22, and that the applicable portions of the depositions maybe photocopied in lieu of 'putting them in typewritten form'." (Exhibits "H" and "I" are part of the record in the court below as attachments to the Designation of Deposition Testimony With Regard to Plaintiff's Case in Chief, which was filed of record March 6, 1979.)

(g) Thereafter, petitioner furnished to the defendants photocopies of the applicable portions of the depositions believed to be pertinent and relevant to the trial.

(h) On March 2, 1979, Sidney G. Dunagan, an attorney representing Kaiser and a partner of Mr. Studivant, appeared at the pre-trial conference and complained to the court that counsel for Daiflon had not followed the court's

Pre-Trial Order requiring the designation of depositions by page and line number.[5] Mr. Dunagan made no reference to Mr. Sturdivant's letter of August 15, 1978, or counsel for Daiflon's response of August 17, 1978, and did not advise the court of the agreement between the parties that the applicable portions of the depositions to be read at trial could be photocopied. Mr. Sturdivant was in the courtroom at the time of Mr. Dunagan's misrepresentation to the Court and he remained silent. The misstatement of counsel for Kaiser, Mr. Dunagan apparently was the motivation for the Court's subsequent admonition to Mr. Crawford, counsel for Daiflon, when the Court advised Mr. Crawford in a harsh tone of voice that *You are not going to run my Court! You either follow the orders of this Court or you get out of the case!*[6]

(i) Thereafter, in accordance with another Order of the court of March 2, 1979, Daiflon submitted, prior to trial, a supplemental designation of deposition testimony by line and page number, a copy of which is attached hereto as Exhibit "J."

With regard to the exhibits, the following are the facts:

Exhibit "F," which is attached hereto as Proposition IX of Petitioner's Response to Defendants' Motion for Judgment Notwithstanding the Verdict and For New Trial, clearly shows all of the facts pertaining to the designation of exhibits by Daiflon on August 22, 1978 and it can be ascertained from Proposition IX that 250 of those exhibits pertained to the defendant Kaiser.

---

[5]Defendants themselves had only designated two of their fourteen depositions by page and line number.

---

[6]Thereafter on March 6, 1979 the Court apologized to Mr. Crawford and stated that there *had been no grounds for his remarks* and that *hereafter, let's keep personalities out of this.* (There was no court reporter present during these remarks by respondent, and the language emphasized is from best recollection.)

Counsel for Kaiser would have the court believe that upon receiving those exhibits, after six years of litigation and the taking of numerous depositions where exhibits were referred to and examined and where Mr. Sturdivant was present representing Kaiser, that the defendants were unaware from those exhibits what the plaintiff's "documents were going to be."

One can imagine the reaction of counsel for Kaiser upon receiving the 250 exhibits that were going to be offered in evidence by the plaintiff during the trial of the case. In all probability they were examined by many Kaiser attorneys and Kaiser officials, probably indexed and cross-indexed and potential objections and arguments prepared with regard to each exhibit.

The only feasible explanation why counsel for Kaiser did not thereafter file objections to any of the exhibits in accordance with the Court's Pre-Trial Order is that, having no defense to the contentions of Daiflon, the strategy would be to attack the number of exhibits and plaintiff's counsel and insist at the time of trial that they were at a "great disadvantage" by not knowing what Daiflon's "evidence was going to be."

Daiflon's Exhibit No. 3687 is illustrative of the documents obtained from Kaiser that were designated as exhibits (A copy of that exhibit is attached hereto as Exhibit "K"). Exhibit No. 3687, which is a competitive status report of Kaiser, provides highly probative information with respect to Kaiser's competitive practices during the year 1970. The Kaiser salesman who prepared the memo indicates that Japanese gas is "infiltrating the Springfield area" and that selected contractors are being offered 1,000 pound quantities which are being shipped direct at reduced prices. He recommends that Kaiser ship ton cylinders direct to U.S. Electric Company, a contractor-customer in order that "they can quote the competitive price." (*Id.*) Mr. Sorensen, Kaiser National Sales Manager, approved the sales-

man's recommendation to ship ton cylinders direct to that customer. Sorensen then notes, in his own handwriting, the following condition: "Limit to contractors who have been offered Japanese gas."

As an example of the depositions that were also designated more than six months prior to trial, we cite only some some of the statements of Harold David Gresham, a former Kaiser employee, as follows:

Q. What, if any, understanding did you have through conversations with Mike (Mike Sharp, the Kaiser salesman who preceded Gresham in Kaiser's Houston Sales Office)?

A. Well, again, that store was selling DuPont and Allied.

Q. With respect to other allocations of business, would you state what, if any, conversations you had with Mike Sharp in connection with allocations?

A. Well, our understanding with Mike Sharp is that — as explained to me — that we would get the business in Port Arthur and the other various larger companies —

Q. With what other company in Port Arthur?

A. The Standard Brass outlet in Port Arthur, and the other larger companies had the other stores, and this is what was allotted.

Q. And what was your allottment?

A. About every fourth truckload.

Q. And how were the other three truckloads divided, if you recall?

A. I understand that DuPont got about two to one of the various other companies. (Deposition testimony of Harold David Gresham, introduced as evidence at trial, p. 15)

(*Id.*, pp. 15 to 16)

* * *

Q. And would you state what occurred during that week with Mr. Rose (Kaiser's Regional Sales Manager, and Gresham's superior?)

A. Well, we went through the product manual and then through the customer files, as to who we were selling, and customers to call on and who we were to solicit from, and spend our time with. And it was basically a recap of what Mike Sharp had done.

Q. Well, just state, as best you can recall, in substance what Mr. Rose stated to you at that time.

A. Well, in substance, as I understood Frank Rose, that Kaiser was a smaller manufacturer of gas, and we were allotted a percentage of the market, and that the various customers had been established and we were to work with these customers."

* * *

Q. What do you mean, a competitive account?

A. Well, we had to match a price. I turned in the information of what the compeition was selling for and what we had to do.

Q. What did you tell him, just report what you told him?

A. I went and gave them a price. I called Frank, told him what the situation — what we had to do to meet competition to get some business. He said, 'We cannot meet competition in that situation', that we would gain no business from them.

Q. Did he explain why?

A. He didn't have to, I knew why . . . [I]n my understanding, in essence what they told me was that we had a certain percentage of the market and if we tried to get more than that percentage, that we would suffer the consequences . . ." (*Id.*, p. 49).

Consequently, it is apparent that the arguments of counsel for the defendants, contrary to the record and contrary to fairness to the plaintiff, had been readily accepted by the respondent prior to the trial and during the trial and for whatever the reasons are most likely to reoccur in the event of a new trial, thereby depriving plaintiff of its constitutional right to trial by jury.

If there were any error committed at trial relating to the admission or exclusion of evidence, that error was clearly committed by the court against Daiflon. For example, apart from the numberous disputed exhibits which are identified as being excluded by the Court in its order of March 22, 1979, the respondent excluded entire groups of exhibits, totaling approximately 320 exhibits, during the course of trial. Furthermore, the respondent district judge committed a grievous error, likely to reoccur once again in connection with the exclusion of testimony and documents relating to Daiflon's plans to build a manufacturing facility. This error, which shall be discussed more fully subsequently, may have greatly reduced the verdict of the jury in connection with the amount of damages suffered by Daiflon.

Petitioner fully recognizes that the grant of a new trial generally does not present an extraordinary circumstance justifying the issuance of a writ of mandamus and/or prohibition. *General Motors Corp. v. Lord*, 488 F.2d 1096, 1099 (8th Cir. 1973) The opinion of the Eight Circuit Court of Appeals in *Lord* contains a helpful discussion of review by way of mandamus where the district court grants a motion for new trial. In that case the jury returned a verdict for the defendant General Motors ("GM") finding that GM's refusal to renew a franchise with the plaintiff was not improper. The plaintiff sought a new trial on the basis of the trial court's commission of allegedly prejudicial error in allowing testimony relative to the misrepresentations of financial condition of the company, the out of

trust condition of the company, and irregularities in the financial records of the company. A new trial was granted, and GM petitioned for mandamus on the bases of abuse of discretion and lack of jurisdiction with respect to the new trial order. The Eighth Circuit, in reviewing petition for mandamus, noted that such relief was only appropriate in extraordinary circumstances. 488 F.2d at 1099. The Court then stated:

> "Extraordinary circumstances may be presented where the district court's order was made without jurisdiction. *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 26, 63 S.Ct. 938, 87 L. Ed. 1185 (1943). Extraordinary circumstances may be presented where the order under attack is characteristic of an erroneous practice likely to reoccur. *See e.g. La Buy v. Howes Leather Co.*, 352 U.S. 249, 258, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957); Note Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv.L.Rev. 595, 610 (1973). Extraordinary circumstances may be presented where the order under attack exemplifies a novel and important question in need of guidelines for the future resolution of similar cases. *See e.g., Schlagenhauf v. Holder*, 379 U.S. 104, 111-112, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); Note, Supervisory and Advisory Mandamus Under the All Writs Act, *supra.*, 86 Harv.L.Rev. 618-619." (*Id.*)

The Court in *Lord* determined that the essential question addressed by the trial court was no different than any other evidentiary issue trial judges decide in the course of granting motions for new trial and to grant the extraordinary relif would abrogate the final judgment rule. (*Id.*, p. 1100) The Court then concluded:

> "The resolution of this question at this time would have little impact on the administration of justice generally and, since it is clear that the trial court had jurisdiction to act, mandamus is clearly inappropriate."

Circuit Judge Bright concurred in the result "with some reluctance," indicating his dismay with the "*** potential waste of legal and judicial manpower necessitated by Judge Lord's order." (*Id.*) Judge Bright observed that the case had consumed seven weeks of trial time, and another trial would surely utilize an equal amount. Then he stated:

> "And if a contrary result is produced in that trial by that exclusion of the questioned evidence referred to in the majority opinion, yet a third trial may be required***." (*Id.*, pp. 1100-1101)

Nevertheless, Judge Bright did determine, as the majority, that while the case "does not qualify as a likely candidate for a new trial," it appeared to have been fairly tried and without gross error. (*Id.*, pp. 1101)

There are fundamental differences between the circumstances of *Lord* and the case at bar:

(1) In *Lord*, unlike this case, specific and legally sufficient grounds were outlined by the district judge in support of his order granting a new trial; that point was not at issue. (*Id.*, p. 1100);

(2) The order under attack in *Lord* could not be deemed to be characteristic of an erroneous practice likely to reoccur;

(3) *Lord* did not involve an action which the district judge had previously dismissed with prejudice, thereby requiring the party to seek and obtain relief with the circuit years prior to the filing of the writ;

(4) The order granting a new trial in *Lord* did not reflect the disosition of that judge to embark upon the course of conduct which would be inconsistent with the verdict winner's right to fair treatment upon the second trial;

(5) There was no evidence in *Lord* of statements by the district judge which reflected an attitude and approach to the litigation inconsistent with the rights of the petitioner there to a fair trial;

(6) The record in *Lord* did not reflect grievous errors committed at trial against the verdict winner which were likely to reoccur upon retrial;

(7) The respondent here refused to act, following the jury verdict, in accordance with the clear mandate of a federal statute (refusal to award threefold damages, 15 U.S.C. §4); no such error was alleged or committed in *Lord*;

(8) The district judge in *Lord* did not indicate that the second trial would only proceed following additional discovery, of undetermined length.

In this case, the desirability of present review clearly outweighs those policies which confine appeals to the review of final orders. *See, Gracelines, Inc. v. Motley*, 439 F.2d 1028, 1031 n.2 (2d Cir. 1971).

In *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*. 73 S.Ct. 388, this Court reviewed upon certiorari the district court's order granting a motion for new trial. In that case the district judge granted the new trial more than six months after entry of the judgment upon the ground (not asserted by defendant's motion) that the jury's verdict of $33,283.00 was excessive and under no circumstances would he permit a verdict in excess of $15,000.00 to stand. Holding that the writ should issue, this Court stated:

> "The question remains whether the circumstances here present a proper case for the utilization of certiorari. We think they do. The writ was sought only after the dismissal of the timely appeal. Ordinarily, on a retrial of the case the order of the court granting the new trial for the stated reasons, could be assigned as error and brough there for review from the final judgment on retrial. *See, Marshall's U.S. Auto Supply v. Cashman*, 10 Cir., 111 F.2d 140. And, given this unfettered remedy, we should be included to withhold the issuance of the writ for pursuance of the more

> conventional procedure. But here, the trial court has stated on the record, in effect, that under no circumstances would he permit a verdict in excess of $15,000.00 to stand. If this statement is accepted on its face, it means that other trials of the case resulting in a verdict in excess of $15,000.00 would never reach this court for review of the order sought now to be reviewed, for each case would result in an unappealable order granting a new trial. It follows from the record that if the petitioner is to have a right of appeal from an unappealable order he must have it now, and the writ is therefore granted." 199 F.2d at 616.

Kanatser underscores the proposition that resort to the All Writs Act is appropriate where the action taken by the district judge in connection with his grant of the motion for new trial demonstrates a likelihood of grevious error to follow, with the strong possibility of subsequent unappealable orders granting a new trial. That is precisely the situation which is currently presented to this Court, assuming that petitioner can muster sufficient resources, and survive the course of presently uncharted pre-trial and discovery proceedings, to endure a second trial. Certainly, the problem now faced by petitioner is not unexpected or unusual for a small antitrust plaintiff who has taken his case not only through trial, but to the circuit court of appeals and the United States Supreme Court prior to trial. The respondent knew, or should have known, that his order granting a new trial at this stage of the proceedings could very well be a "death knell" for petitioner.

The respondent's new trial order borders on jurisdictional inadequacy. The order appears to be predicated upon five "findings":

(a) Daiflon's counsel had the jury "in the palm of (his) hand almost from the beginning" (Exhibit "A," pp. 2-3);

(b) The trial was not fair to defendants or to the court

because of the "literally dozens and dozens of exhibits that were not agreed to" (*Id.* p. 3);

(c) The jury did not understand "about this gas business" (*Id.*, p. 4);

(d) The defendants "had a perfect right to meet competition, and for them not to meet competition is to deny them free enterprise." (*Id.*, p. 5);

(e) The actual damages awarded by the jury were excessive: "There is nowhere it reaches $2,500,000.00." (*Id.*, p.6).

Without belaboring the point, the Court's ruling of May 14, 1979 is remarkable not only as a demonstration of the Court's lack of comprehension with respect to the issues presented, but also with respect to its patent insufficiency, as a matter of fact and law, in connection with vacation of the Special Verdict of the jury. The respondent's approach, attitude, and thinking is readily apparent from a review of his rulings. With respect to the trial judge's "palm of the hand" comment, it is clear that the effectiveness of trial counsel for one of the parties is not ". . . one of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Rule 59(a) F.R.Civ.P.

The nature of the jury's understanding "about this gas business" is likewise an insufficient predicate for a new trial. The attentiveness of this jury is a matter of record:

> MR. ATHENS (counsel for Allied Chemical): I speak quite earnestly when I say that you are probably the most attentive jury that I have had the pleasure of appearing before . . ."
>
> MR. MEYERS (counsel for Union Carbide): ". . . let me tell you that on behalf of Union Carbide, we couldn't feel more comfortable under the circumstances being in this courtroom . . . and after sometime tomorrow being in your hands. We are very

comfortable in that circumstance . . ."

MR. KOLOWRAT (counsel for Pennwalt): "I do, of course, want to endorse very much what other counsel on both sides here have said in expressing their appreciation to you for your patience and your attentiveness . . . I feel very comfortable and welcome . . . to . . . have you decide the case of my client, our client, Pennwalt Corporation . . . we picked you as the fairest jurors that we saw. We are well satisfied with you . . . common sense. That's what you've got. That's what will help you decide this case."

[The foregoing are excerpts from the closing statements of defense counsel.]

The Court's statement that Daiflon started out with a capital investment of $200,000.00 is plainly inaccurate. The testimony was that the President, Richard E. Carter, contributed the assets of $100,000.00 from Carter Supply (valued at approximately $75,000.00), an air conditioning and heating wholesaler, to the business. Additionally, $200,000.00 was contributed by the company's Vice President, R. D. McDonald in exchange for stock and a note. F. C. "Bus" Adams, Daiflon's Sales Manager, contributed $50,000.00. Furthermore, Daiflon had a $500,000.00 line of credit with the United States National Bank of Galveston, Texas. Even if the Court had been correct in his analysis of the "capital investment of Daiflon," the hypothetical analogy of respondent going into the oil business to "get a block and drill a well, on $100,000.00" is simplistic and nonsensical. (*Id.*, p. 5) Particularly alarming is respondent's observation that the "$200,000.00" wasn't enough to get them started "*** as long as the defendants were concerned about their business." (*Id*).

The Court did not recognize that Daiflon's evidence with respect to its damages, through its President, Vice President, Sales Manager and expert witness was uncon-

troverted — defendants called no witnesses whatsoever with respect to either impact or damages. Finally, the Court's gross abuse of discretion with respect to the matter of damages is compounded by his reference, in the new trial order to the fact that "*** where you'd find a conspiracy, and it is operation, why, for punishment the Court adds, triples it ***.") (*Id.*, p. 6) It suffices to say that the trebling required by §4 of the Clayton Act, upon a finding of violation of the antitrust laws, its not a proper consideration in connection with the establishment of actual damages.[7]

A critical error committetd by the respondent judge at trial against Daiflon, likely to be committed upon retrial, involves Daiflon's right to present evidence regarding the construction of a plant to manufacture refrigerant gas. At trial, all evidence, including contracts which had been executed with Dow Chemical Company regarding the supply of raw materials for a manufacturing facility, were excluded by the Court as "too speculative." Plaintiff submitted a brief at trial in connection with its right to present such evidence, and specifically cited to the Court the case of *Wood Exploration & Production Co., Inc. v. Aluminum Company of America*, 509 F.2d 784 (5th Cir. 1975). That case involved the claim of monopolization under §2 of the Sherman Act. The appellate court had under review a contention by the antitrust defendants that the court could not properly allow the jury to consider plaintiff's evidence that it was damaged, in part, because of a result of defendant's antitrust violation it was precluded from constructing a plant (in the Woods Exploration case an extraction plant adjacent to a natural gas field), which, but for the violations, plaintiff believed it might have been able to construct

[7]The respondent's reference to trebling may explain his refusal to treble the judgement as required by law following entry of the jury verdict.

and operate profitably. The Fifth Circuit stated as follows on the contention of the defendant Alcoa that plaintiff's damages in this regard would be unduly speculative:

> "Alcoa argues that Southeastern's hypothetical profits from the proposed extraction plant planned with Lumar were too speculative to form a sound basis for jury computation of damages. Our review of the record discloses that Southeastern introduced competent evidence relating to its probable profits from the proposed extraction plant . . . The basis for the damage award in the instant case was not impermissibly inprecise under the teachings of . . . (such cases as *Lehrman v. Gulf Oil Corporation*, 464 F.2d 26 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077) . . . Alcoa's argument in this regard is rejected." (509 F.2d at 792)

Woods Exploration is right on point; nevertheless, the Court arbitrarily precluded Daiflon from presenting such evidence at trial. No consideration was given by the Court to the opinion of the United States Supreme Court in *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) wherein it was stated:

> "Trial and appellate courts alike must . . . observe the practicable limits of the burden of proof which may be demanded of a treble damage plaintiff who seeks recovery for injuries from partial or total exclusion from a market; damage issues in these cases are rarely suceptible to the kind of concrete detailed proof of injury which is available in other contexts." (327 U.S. at 264)

It is clear from the order granting a new trial that the respondent, upon retrial, will not permit a verdict proximating that returned by the jury at the first trial to stand. Daiflon respectfully submits that, while the jury determined its business and property losses to be in the sum of $2,500,000.00, if it had been permitted to introduce evi-

dence of its plans to build a manufacturing facility, the jury verdict may have been substantially greater than that returned.

Respondent's lack of comprehension with respect to the issues of the case, and total disregard of the evidence presented by Daiflon, is illustrated by the statement in the new trial order that "*** defendants had a perfect right to meet competition, and for them not to meet competition is to deny them free enterprise." (Exhibit "A," p. 5) Daiflon does not now, nor has it ever, disputed that right of defendants. However, the respondent's recital of that principle as dispositive of Daiflon's antitrust contentions is representative of the Court's view, and intent, to retry this case until there is a defendants' verdict. Moreover, such a statement totally overlooks (contrary to the standards applicable to determination of motions for new trial) the uncontroverted and undisputed evidence presented by Daiflon at trial. For example, Daiflon introduced several exhibits at trial (Nos. 1224, 1236, 1259, 1264 and 1265) obtained from the defendant DuPont which disclosed that during the period June, 1970 through February, 1971 DuPont had engaged in an investigation of freight rates from Japan to various locations in the United States, including Houston, Daiflon's plant location. Moreover, exhibits show that DuPont also attempted to determine the prices paid for refrigerant grades 11, 12 and 22 (those distributed by Daiflon) by the customers of Daiflon's Japanese supplier Daikin-Kogyo. The question for the jury was the commercial use that DuPont, the undisputed price leader in the industry, was making of such information. Daiflon contended and established by evidence that DuPont was determining, prior to the March, 1971 price reduction, what Daiflon's costs of operations were so that it would know what price level would be required to eliminate the competition encountered from Daiflon. This is not "meeting competition," and there was no evidence presented by

DuPont, or any other defendant, to the contrary.

Respondent's statement pertaining to "meeting competition" flies in the face of Daiflon's Exhibit No. 3016. A copy of this exhibit is set forth in full as Exhibit "H," which Exhibit "H" is attached hereto and by reference incorporated herein. The Director of Sales for Allied Chemical suggests a number of highly-competitive actions to counter the threat of Daiflon including, *inter alia*, (a) Dumping "Genetron" (Allied's trade name for refrigerant gas in Japan); (b) directing the flow of refrigerant gas from Japan to foreign markets other than the United States; (c) taking Japanese manufacturer (Daikin-Kogyo) out of the business; (d) supplying the Japanese manufacturers' representatives; (e) selling through wholesalers and giving customers a "functional fee for business obtained in competition against Daiflon." The issue presented, then, is whether this is an example of the "perfect right to meet competition" which, if denied, would be to deny defendants "free enterprise." The jury determined otherwise.

Plaintiff's Exhibit Nos. 1062 and 1065 are important in connection with the court's conclusion that defendants may be denied free enterprise if not permitted to exercise their "perfect right to meet competition." Plaintiff's Exhibit Nos. 1062 and 1065 are set forth in full as Exhibits "I" and "J" respectively, which Exhibits "I" and "J" are attached hereto and by reference incorporated herein. Pl. Exh. No. 1065 is a DuPont trade report prepared by DuPont salesman D. B. Hartman describing a sales call occurring on April 30, 1971 to Mr. Robert Gennett, President of Refrigeration Supplies Distributor. Mr. Hartman's trade report was distributed to seven DuPont employees including R. Wright, Jr., the National Manager for Refrigerants and P. B. O'Donnell, Marketing Manager for the Southwest Region. In this report Mr. Hartman concludes that: "Mr. Gennett is causing quite a stir in the market in the Birmingham area. He is passing on the 13% discount which we of-

fered in order to combat the Japanese refrigerant." DuPont did not choose to call Mr. Hartman as a witness to testify with respect to his conclusions as set forth on Pl. Exh. No. 1065, nor were Messrs. O'Donnell or Wright called as witnesses. This exhibit is particularly significant when viewed within the perspective of Pl. Exh. No. 1062, which is interoffice correspondence from Luther Cox of Virginia Chemicals (DuPont's sales agent) to P. B. O'Donnell of DuPont bearing date of April 30, 1971. Cox states:

> "I believe that our new pricing policy will be a great help in combatting the threat of Daiflon [sic]. If there's any sudden changes in this area, Mike and I will let you know promptly."

The evidence at trial was replete with other instances of conduct by defendants supportive of Daiflon's claims for relief. The district judge has apparently determined, as stated at the hearing of March 2, 1979 prior to trial, that if the defendants were in fact guilty of the claims made by Daiflon, they would have settled the lawsuit. Based upon the order denying a new trial, and viewed within the perspective of the trial court's handling of the case for the six and one-half years prior to trial, it is unlikely that his attitude or determination in connection with the merits of the case will change.

It is to ignore the realities of litigation to fail to recognize that interminable delays, errors requiring appeals and the expense of multiple trials may operate — individually and especially in combination — to deny a plaintiff of limited resources practicable access to the judicial system. Under all the particular circumstances of this case intervention by this Court at the present time is absolutely necessary.

VI

Exhibits

Attached hereto as exhibits and incorporated by reference herein, are Exhibits "A" through "N," in which are

set forth the following:

1. Exhibit "A": Respondent's rulings and comment on defendants' motions for judgment n.o.v. and for new trial dated May 14, 1979;

2. Exhibit "B": Special Verdict of the jury dated March 30, 1979;

3. Exhibit "C": Petitioner's proposed judgment presented to the Court April 2, 1979;

4. Exhibit "D": Judgment entered by the Court on April 9, 1979;

5. Exhibit "E": Motion for Judgment Notwithstandin the Verdict and for New Trial, filed April 18, 1979;

6. Exhibit "F": Proposition IX of Petitioner's Response to Defendants' Motion for Judgment Notwithstanding the Verdict and New Trial, filed May 10, 1979;

7. Exhibit "G": Order of the Court with respect to admission of exhibits, filed March 22, 1979;

8. Exhibit "H": Letter dated August 15, 1978 from James M. Sturdivant to B. Hayden Crawford;

9. Exhibit "I": Letter dated August 17, 1978 from B. Hayden Crawford to James M. Sturdivant;

10. Exhibit "J": Petitioner's Designation of Deposition Testimony, filed in the trial court March 2, 1979;

11. Exhibit "K": Petitioner's Exhibit No. 3687;

12. Exhibit "L": Petitioner's Exhibit No. 3016;

13. Exhibit "M": Petitioner's Exhibit No. 1062;

14. Exhibit "N": Petitioner's Exhibit No. 1065.

WHEREFORE, Petitioner respectfully prays that a writ of mandamus, or in the alternative, a writ of prohibition, be issued by this Court directed to the respondent, The Honorable Luther Bohanon, Judge of the United States District Court for the Western District of Oklahoma directing respondent to reinstate the Special Verdict of the jury and to enter judgment thereon as required by law, to set a hearing for determination of a reasonable attorneys' fee to be included in such judgment, and prohibiting the re-

spondent from proceeding further relative to the order for a new trial, and for such other and further relief as this Court may deem proper.

DATED May 25, 1979.

Respectfully submitted,
PRICHARD, NORMAN & WOHLGEMUTH
B. HAYDEN CRAWFORD
FRANK GREGORY
/s/ Joel L. Wohlgemuth
1100 Philtower Building
Tulsa, Oklahoma 74103
/s/ B. Hayden Crawford
1714 First National Tower
Tulsa, Oklahoma 74103
/s/ Frank Gregory
1714 First National Tower
Tulsa, Oklahoma 74103
Attorneys for the Petitioner,
Daiflon, Inc.

[Attachments deleted in printing.]

APPENDIX G

July Term — August 10, 1979

Before Honorable Robert H. McWilliams,
Honorable Jean S. Breitenstein, and
Honorable William E. Doyle, Circuit Judges.

No. 79-1459

DAIFLON, INC., Petitioner

vs.

THE HONORABLE LUTHER BOHANON,
Judge of the United States District Court
for the Western District of Oklahoma, Respondent.

The matter is before this Court on the petition of Daiflon, Inc. seeking a writ of mandamus or a writ of prohibition against the respondent trial judge, the Honorable Luther Bohanon.

On May 14, 1979, the trial court herein entered its order granting a new trial to all of the defendants in the above-entitled case. This order also set aside a very substantial jury verdict.

The matter has been extensively briefed, and the briefs include statements of the case. However, this Court is asked to judge the exercise of discretion on the part of the trial judge without having a record or a statement of evidence with which to measure the action taken by the trial court.

Accordingly, the parties are directed, in lieu of a transcript of the evidence, to prepare and sign a narrative statement of the case along the lines provided in Rule 10(d) of the Rules of Appellate Procedure. Each side shall prepare a summary of the evidence presented by it at the trial. These summaries shall be simultaneously prepared and shall be simultaneously submitted on or before September 11, 1979.

This matter shall be orally argued and presented by counsel to Division I of this Court in Denver, Colorado, on Tuesday, October 9, 1979, at 10:00 a.m.

It is the further order of the Court that proceedings in the appeal of the defendants from the judgment entered and from the order denying the motion for judgment not withstanding the verdict entered in this action on May 14, 1979, (presently Undocketed Appeal No. 24 in this Court) are suspended pending the disposition of the petition for writ of mandamus or prohibition.

/s/ Howard K. Phillips, Clerk

APPENDIX H

In the United States Court of Appeals
For the Tenth Circuit

No. 79-1459

DAIFLON, INC., Petitioner,

vs.

THE HONORABLE LUTHER BOHANON,
Judge of the United States District Court
for the Western District of Oklahoma, et al.,
Respondents.

Petitioner's Narrative Statement of the Case

The petitioner, Daiflon, Inc. ("Daiflon"), pursuant to this Court's order of August 10, 1979, respectfully submits the following narrative statement of the proceedings in the court below:

I. THE EVIDENCE PRESENTED BY DAIFLON DURING ITS CASE IN CHIEF.

A. *The Principals of Daiflon.*

(1) *Richard E. Carter*

(a) *Direct Examination*

Richard E. Carter ("Carter") is the president of Daiflon, an inactive corporation. (Carter, 63) The other officers of Daiflon are F. C. "Bus" Adams, Vice President, and R. D. McDonald, Secretary-Treasurer. (*Id.*, 63-64) During the period 1955 through 1964 Carter worked for various companies engaged in the heating and air conditioning business. (*Id.*, 64-65) He then formed Carter Supply Company in Tulsa, Oklahoma which was a heating and air conditioning wholesale distributor. (*Id.*, 66) Carter Supply sold all the products that are used in connection with the assembly of heating and cooling systems. (*Id.*) The business of Carter Supply was primarily in new construction, such as new furnaces and air conditioners for homes. (*Id.*, 67)

An "air conditioning and refrigeration wholesaler" is primarily engaged in the business of selling replacement

parts, compressors, expansion valves, repair parts, refrigerant gas, and other items of that nature. Carter Supply would obtain refrigerant gas from an air conditioning and refrigeration wholesaler for repair of an air conditioning system which had been sold to a dealer and installed. (*Id.*, 68) The wholesalers had obtained refrigerant gas through distribution patterns for the product which had evolved over a period of time. (*Id.*, 68-69)

Until 1963 DuPont was the only manufacturer of refrigerant gas because of patent control. (*Id.*) DuPont was followed into the business by Allied Chemical and then Pennwalt. Then came Union Carbide, Kaiser and Racon. (*Id.*, 69-70)

The aftermarket (replacement market) for refrigerant gas is the repair side of the market and the OEM market is comprised of companies that construct the air conditioning equipment. OEM refers to original equipment manufacturer. (*Id.*, 70) The original equipment manufacturer purchases refrigerant gas from the defendants in tank cars for use in new equipment. (*Id.*) The refrigerant gas market also includes the solvent market (cleaning) and the foaming agent market (for use as propellants for aerosol and for the manufacture of styrofoam). (*Id.*, 71) In the automobile industry sales of refrigerant gas to the manufacturers of new automobiles would be considered to be sales within the original equipment market. Additionally, there is a replacement market or aftermarket in the automotive industry which consists of the refrigerant gas used for replacement charge in automobiles where there is a leak or a breakdown in the air conditioning system. (*Id.*, 72)

Refrigerant gas is manufactured and sold in grades which are identified by "R" numbers, e.g., R-11, R-12, and R-22. Each grade is determined and identified by its different use in the industry. (*Id.*, 73) R-11 is utilized in large equipment in the aftermarket such as buildings which have large central systems. (*Id.*, 74) Another major use of R-11

is in the aerosol can. It is used as a cleaning solvent. Daiflon purchased and sold R-11. (*Id.*, 74-75)

R-22 is used primarily for air conditioning equipment. R-12 is used in air conditioning equipment, but its application is generally limited to equipment requiring low temperature control, such as food lockers. Diaflon distributed both R-12 and R-22. (*Id.*, 75)

R-502 is used primarily for air conditioning equipment in supermarkets and was not purchased or sold by Daiflon. (*Id.*, 76)

Refrigerant gas is sold in the aftermarket in small cylinders, and Daiflon sold refrigerant in 25-lb. cylinders, 50-lb. cylinders, 100-lb. cylinders, 125-lb. cylinders, and 145-lb. cylinders. (*Id.*, 77) The poundage refers to the net weight of the contents of the cylinder. (*Id.*) When Diaflon was formed it purchased gas in one-ton cylinders and then transferred or "repackaged" it into the smaller cylinders described above. (*Id.*, 78) The designation "repacker" in the industry denotes a person or company that purchases refrigerant in bulk or large quantities and repackags it into smaller units. (*Id.*, 78-79) The transfer of the gas is made through a closed transfer system with pumps and is accomplished under pressure. (*Id.*, 79) Originally, Daiflon maintained the equipment to accomplish the transfer or repackaging process in Tulsa, Oklahoma. (*Id.*)

During the period of time that Carter was involved in the indusry the distribution chain for the sale of refrigerant gas was from the manufacturer to a wholesaler (termed an "ARW wholesaler" and primarily in the parts and service business). The wholesaler distributed gas to the contractor who in turn sold it to the homeowner or used it in the consumers' market. (*Id.*, 78-80) ARW is a trade group to which many people who are distributors of refrigerant gas belong. There are wholesalers who are not members of the association, but typically wholesalers were referred to as "ARW" because of the type of operation conducted. (*Id.*, 80)

When Carter operated Carter Supply Company he attempted to purchase refrigerant from wholesalers in Tulsa and was refused. (*Id.*, 81-82) The reason for the refusal was that he was in competition with them. It was not unusual for a "warm air wholesaler" like Carter Supply to enter the market and attempt to purchase refrigerant from a competitor who was an "ARW-type wholesaler". If the ARW-type wholesaler did not sell gas to the warm air wholesaler the latter was generally unable to purchase refrigerant. (*Id.*) In most instances the warm air wholesaler could not go directly to the manufacturer. (*Id.*) At one point in time Carter, while operating Carter Supply, attempted to purchase refrigerant directly from the defendant manufacturers, but was unsuccessful. (*Id.*)

Carter was eventually able to acquire a source of refrigerant gas from Penn Engineering Company, a repacker. (*Id.*, 83) Penn Engineering purchased its refrigerant gas in bulk from DuPont and Kaiser. (*Id.*) Carter Supply did not purchase a "large amount" of refrigerant gas from Penn Engineering, but purchased in two or three thousand pound quantities. (*Id.*, 90) Carter Supply's source of refrigerant gas was "cut off" in 1968 due to the fact that Carter had entered into a "competitive situation" with the existing ARW wholesalers. (*Id.*, 91) Carter had made a mailing over the Eastern part of Oklahoma for the sale of refrigerant gas at the same price that the ARW wholesalers had offered refrigerant to Carter's customers. (*Id.*) Approximately one week following the mailing, Mr. O'Donnell from DuPont came to Carter Supply and the next day Penn Engineering cut off Carter and stopped further sales to Carter Supply. (*Id.*, 91-92) At no time after that did Carter receive any refrigerant from Penn Engineering, although he attempted to make additional purchases. (*Id.*) His last attempt to buy refrigerant gas from Penn Engineering was in the summer of 1968. Carter had placed an order with Penn Engineering prior to the time that he was cut off, and later forwarded

a cashier's check for the existing order. No gas was received and he requested return of the check in September, 1968. (*Id.*, 93)

Carter Supply then found another source of refrigerant from a company called Western Supply Company in Hutchinson, Kansas. Western purchased its gas from Japan. (*Id.*, 95) Carter Supply continued to purchase gas from Western Supply until 1968 when he formed Diaflon and went into the repackaging and importing business. (*Id.*, 95-96) The name "Daiflon" was used because it was the trade name of the product manufactured by Daikin-Kogyo, the Japanese manufacturer, and the refrigerant gas was marketed under the name "Daiflon". (*Id.*, 96) Mr. Bentley, president of Western Supply, had the import rights for the United States for gas manufactured by Daikin-Kogyo, and Daiflon made an arrangement with Bentley to import the gas and to pay Bentley an "override". Bentley was to do the paperwork and shipping. He also made arrangements for purchase orders to be entered in Japan. (*Id.*, 97)

The refrigerant gas from Japan primarily came into the United States through ports of entry in Houston and Galveston. (*Id.*) Daiflon purchased gas in one and two-ton containers. (*Id.*, 97-98) When Daiflon was originally formed it operated in Tulsa, Oklahoma from the old location of Carter Supply. (*Id.*, 98) At the time Daiflon was first formed Mr. Adams, as General Sales Manager, was "on the road" and sold wholesalers who could not otherwise purchase gas from the defendants. (*Id.*) Carter and Adams knew there was a market for refrigerant gas from their experience in the industry, and in 1969 Daiflon sold all the gas that it could purchase. (*Id.*, 99)

In the late summer of 1970 Daiflon built a plant in Galveston, Texas and moved its operations there in January of 1971. (*Id.*, 99-100) The plant was a storage and packaging facility with five 30,000 gallon storage tanks having a total capacity of 1,400,000 pounds of refrigerant.

In Daiflon's Galveston plant there was a filling line, a complete assembly line, and equipment to evacuate cylinders for moisture removal. The plant also had refilling equipment. (*Id.*, 100) Moisture presents a problem in the packing of refrigerant gas and is prevented or remedied through evacuation. Daiflon had the equipment in Galveston to accomplish that procedure. (*Id.*, 100-101) The plant was built about a block from the primary dock that it was using in Galveston, Texas. (*Id.*, 101)

During the year 1969 Daiflon filed a joint tax return with Carter Supply and showed a loss of approximately $19,000.00. Daiflon was a totally owned subsidiary of Carter Supply Company and in 1970 was merged into Carter Supply. The name Carter Supply was changed to Daiflon at that time. (*Id.*, 102) The owners of Daiflon were Carter, Adams, and McDonald. (*Id.*, 102)

In 1970 Daiflon's profit was approximately $58,000.00 and Carter anticipated that the profit would increase when he moved the operation to Galveston. (*Id.*, 102-103) Daiflon's primary difficulty in the years 1969 and 1970 was the fact that it had no storage facility and it was necessary for him to take one-ton tanks of gas, transport them to Tulsa and repackage them there without storage. A storage system was built in Galveston and this problem was eliminated. (*Id.*, 103)

During the years 1969 and 1970 Daiflon sold primarily in the central part of the United States. Daiflon eventually marketed gas in 31 states. (*Id.*) It continued to sell refrigerant gas until 1972, with the last sale being made October 12, 1972. (*Id.*, 104)

Daiflon's sales continued to increase in 1970 and until June of 1971 at which time they went "right straight down". (*Id.*, 105) In March of 1971 there was a 13% across the board decrease in the sales price of refrigerant gas by the defendant manufacturers, and that price decrease began to take effect in June of 1971. (*Id.*, 105) Daiflon was unable to

meet the decrease and lost many customers. (*Id.*) The 13% decrease stayed in effect through the year 1971 but there were many additional deviations from list prices. (*Id.*, 106) The list price is a published price sheet put out by the manufacturers to the wholesalers. The manufacturers also, at a point in time, printed a suggested retail sheet which they furnished to the wholesalers. There were many additional off-list "deals" which reduced the price of refrigerant gas to the wholesalers. (*Id.*) The off-list concessions were made in many ways, e.g., a truckload discount for less than truckload shipments, credits for "leaking" cylinders which in fact did not leak, percentage discounts, year-end rebate discounts, cash rebates, and additional types of rebate arrangements. (*Id.*, 109-110)

Due to the fact that it takes a period of time for a price move by a manufacturer to be felt in the marketplace, it was not until June that Daiflon felt the effect of the March, 1971 13% decrease by the refrigerant manufacturers. At that time Daiflon's sales suffered a considerable reduction. (*Id.*, 111) July sales were under $10,000.00 while June sales had been at approximately $160,000.00. Under the circumstances, Daiflon was able to continue operations until October 12, 1972. (*Id.*, 112) Prior to that time, in March of 1972, the defendants reduced the prices of R-11, R-12, and R-22 (sold by Daiflon) while there was an increase in the sales price of other products not sold by Daiflon. That action by the manufacturers essentially "stopped sales" for Daiflon. (*Id.*, 113—114) Daiflon made the decision in the summer of 1972 that it could not survive under the pricing structure and advised customers that it would be going out of business. (*Id.*, 114) In October and again in December of 1972 the defendants increased prices of refrigerant gases previously sold by Daiflon, both increases occurring after Daiflon had closed its business. (*Id.*, 114-115)

Daiflon utilized returnable rather than disposable cylinders. (*Id.*, 115) Disposable cylinders are the same as

returnable except they are lighter, and less expensive to construct. There were a number of difficulties with the disposable, "throw away" cylinders; for example, two or three people were killed when a disposable cylinder ruptured as a result of the valve being knocked off. Also, many of the disposable cylinders leaked. (*Id.*, 116)

Carter's overall plan from the inception of Daiflon was to build a sales program with the view toward eventually becoming a producer of gas. It was projected that Daiflon would enter into all segments of the refrigerant gas market after its manufacturing facility was constructed, i.e., the OEM segment, the automotive market and the aftermarket. (*Id.*, 124)

There is a distinction in the industry between the automotive and non-automotive aftermarket. The automotive market involves primarily the one and two-pound cans which are used to recharge automotive air conditioners. There is generally a different type of distribution in the automotive as compared to the non-automotive aftermarket. (*Id.*, 125) The bulk of the automotive industry is furnished by repackers, which is the same type of business in which Daiflon was engaged. (*Id.*, 132-133)

DuPont initiated the price reduction of March, 1971 and the other defendants followed. Allied initiated the reduction of March, 1972, and the other defendants followed. (*Id.*, 138)

The trade names for the refrigerant gases distributed by the defendants are as follows: Freon (DuPont), Genetron (Allied Chemical), Isotron (Pennwalt), UCON (Union Carbide), Racon (Racon). Kaiser has never used a trade name. (*Id.*, 139-140) Freon 22 is essentially the same product as Kaiser's 22 and Daiflon's 22 or any other R22. (*Id.*, 40)

Adams was a 25% stockholder of Daiflon and held the office of Vice President. His responsibilities were in sales. (*Id.*, 141) Carter had the general administrative responsibili-

ties for Daiflon while Adams travelled the country, hired sales representatives, and sold refrigerant gas. (*Id.*) McDonald was the secretary-treasure of Daiflon and was not active on a day-to-day basis. (*Id.*, 141-142) McDonald invested $200,000.00 in the corporation; $100,000.00 for stock and a loan of $100,000.00. (*Id.*, 142)

When Daiflon received its gas from Japan it came through customs with a laboratory analysis. After the gas was repackaged Daiflon took taps on the tanks in Galveston through an independent laboratory which had an additional analysis made. (*Id.*, 142-143) Daiflon did not have many problems with leaking cylinders, and never gave a rebate or discount to a customer for a cylinder that did not actually leak. (*Id.*, 142-143)

(b) *Cross Examination*

Except for one order of refrigerant gas that Daiflon imported from Germany, all the refrigerant gas which it purchased and resold came from Japan. (*Id.*, 147) Carter did not, at the time that he formed Daiflon, ask any American producer of refrigerant gas to sell gas to Daiflon. (*Id.*, 148) During the time that Daiflon was in business it did not request to purchase refrigerant gas from any of the defendants. (*Id.*) Before Carter commenced importing refrigerant gas from Japan he did not conduct studies of the marketplace, although he knew the costs and selling prices involved. (*Id.*) Carter does not have an engineering or accounting background. (*Id.*, 149) The only information Carter had with respect to the poundage and consumption of refrigerant gas in the United States was received from the Japanese. (*Id.*, 150)

Daikin-Kogyo, the Japanese manufacturer, placed one and two-containers on ships in Japan for export to the United States. (*Id.*, 151-152) When the containers arrived in the United States they were taken off the ships and transported to Daiflon's facilities. (*Id.*, 152-153) Daiflon was involved in the importation of refrigerant gas and its costs

were higher than those incurred by the defendants. (*Id.*, 154-155) In 1969 and 1970 Daiflon had a shortage of refrigerant gas, and it sold all gas that had been received. (*Id.*, 155) One of the factors relating to Daiflon's shortage of gas was that there were only so many ships that could bring the gas from Japan to the United States. Also, Daiflon was allocated only a specific amount of one-ton containers by Daikin. (*Id.*, 160-161) Therefore, Trinity Steel in Dallas built 50 two hundred ton containers for Daiflon; however, the cylinder shortage was a problem. (*Id.*, 161)

In 1969 Daiflon experienced a shortage of R-22 because of a shortage of ocean-going containers. (*Id.*, 163) That shortage continued into 1970. (*Id.*)

At one time Daiflon returned 100 containers to Japan with their valves knocked off and with grease in them. (*Id.*, 164) Accordingly, Daiflon decided not to ship on the Lykes Lines if it could be avoided. (*Id.*, 164-164)

At one point in time there was a dock strike in the United States that prevented Daiflon from receiving refrigerant gas from Japan. (*Id.*, 166) That may have occurred in 1971 and covered the gulf coast and eastern coast ports. (*Id.*, 167) Once a ship carrying Daiflon's containers back to Japan collided with another ship in the Japanese harbor. (*Id.*, 169-170)

Daiflon paid the customs and duty on refrigerant gas imported from Japan. (*Id.*, 170) Daiflon paid a 5% importers fee to Mr. Bentley of Western Supply. (*Id.*, 170-171) Daiflon had a minor problem with respect to the Japanese supplier refusing to accept letters of credit issued by the United States National Bank of Galveston. (*Id.*, 171-172)

There were times at which Daiflon was out of refrigerant R-12 and unable to fill orders from customers for that product. (*Id.*, 173) Daiflon did not purchase R-502 from Daikin, nor did it attempt to buy R-502 from any of the defendants. (*Id.*, 174) The lack of R-502 hurt Daiflon's sales. (*Id.*, 174-175) One of Daiflon's large customers that

needed R-502 was an association called ISE which needed R-502 for use in supermarkets. Daiflon could not provide them with R-502. (*Id.*, 175-176)

Daiflon did not import refrigerant gas from Japan after August of 1971; during the period of time between August, 1971 and October, 1972 Daiflon was selling gas out of inventory that had been acquired prior to August, 1971. (*Id.*, 175-176) In August of 1971 the President of the United States imposed a 10% surcharge on imports to the United States from all countries including Japan. (*Id.*, 176-177) The import surcharge imposed at that time increased the import duty on refrigerants from 6% to 16%. The import surcharge had not been anticipated by Carter. (*Id.*, 177)

(c) *Additional Direct Examination*

The independent laboratory tests of Daiflon's gas were conducted by Petroleum Analytic Research of Houston, Texas, and also by Galveston Laboratories. The purpose of testing was to maintain a pure product. (*Id.*, 189) Daiflon did not have a problem with "wet gas" — a high moisture content within the product. (*Id.*, 189-190)

There was a custom which had developed in the refrigerant gas industry with respect to the shipment of one-ton containers. The manufacturers delivered such containers directly to the jobsite where a large unit was being charged or where there was need for a large amount of refrigerant. These cylinders were not sold to the wholesaler at his place of business. (*Id.*, 190-191) The reason that these cylinders were distributed directly to the jobsite was to discourage the unauthorized repackaging of gas. (*Id.*, 191)

The Galveston plant was on approximatley one acre of land. The building was steel and occupied 5,000 square feet. The five 30,000 gallon storage tanks were interconnected in the building through a piping arrangement and through a pumping system where the gas could be transferred from the large tanks into the building for repackaging into

smaller tanks. There was a manifold system between the large cylinders and the storage cylinders in the plant which enabled Daiflon to unload twenty to thirty one to two-ton cylinders at a time into the storage system. (*Id.*, 192) Inside the building there was an assembly line operation which started at one end of the building where the valve was removed from the small cylinders that had been returned. The cylinder was visually inspected, the valves replaced, and then the cylinder was repainted and refinished. The cylinder was next placed in a line for the vacuum pump which removed all the moisture from the cylinder. Gas was then pumped back into the cylinder and the cylinders placed on pallets and stored. (*Id.*, 192-293)

The surcharge which was imposed on August 15, 1971 remained in effect for three months. (*Id.*, 196) At the time the surcharge was imposed Daiflon, with approximately 1,000,000 pounds of gas in storage, was having difficulty selling refrigerant. (*Id.*) This was because of the 13% reduction in price which occurred in March of 1971. Daiflon did not endeavor to buy refrigerant during the period of time that the surcharge was in effect. (*Id.*, 196-197) The surcharge did not constitute an actual detriment to Daiflon since Daiflon had in storage product that had been bought at the old cost without the surcharge. (*Id.*, 197) Daiflon did not purchase any additional gas at that time because it could not sell what it had on hand. (*Id.*, 198)

During 1971 Carter prepared a projected statement of income for Daiflon which reflected a net income figure (before tax) of $200,897.12. (*Id.*,200-204) The Galveston plant had the capacity to handle the gross sales projected by Carter in 1971. (*Id.*, 204) The maximum gross sales which the Galveston plant could have handled was $5,000,000.00 per year. (*Id.*, 204-205) Based upon Carter's projections he arrived at a value of Daiflon had it been free to compete fairly in the market as of October 12, 1972. The operation in Galveston had a potential to earn $400,000.00 per year by

utilizing the plant fully and he projected that against eight years or eight times earnings. Therefore, his total projection based on such calculations was that Daiflon had a vlaue of over $3,000,000.00 on October 12, 1972. (*Id.*, 205-207)

In the operation of its sales department, Daiflon employed agents to sell particular territoriers. There were sales representatives in Alabama, North Dakota, South Dakota, Illinois, Iowa, Mississippi, Missouri, Nebraska, Tennessee, West Texas, and Wisconsin. (*Id.*, 207) These agents operated in addition to the sales force which was under the supervision of Mr. Adams. (*Id.*, 207-208)

At one time Daiflon entered into contracts for the purchase of chemicals to be used in the production of refrigerant gas. (*Id.*, 208)

(d) *Additional Cross Examination*

In September, 1971 Carter wrote a letter to Mr. Kojima of Daikin in which he stated that the 10% surcharge had a "disastrous effect on a business of our nature". (*Id.*, 213) Carter further indicated in that letter the 10% tax was a cost increase which could not be absorbed by either Daikin or Daiflon. (*Id.*) Either in late 1971 or 1972 there was a change of relationship between the Japanese yen and the dollar which reduced the purchasing capacity of the dollar. (*Id.*, 215-216)

During 1971, in perhaps June or July, Carter wrote a letter on behalf of Daiflon to a customer stating that prices for the balance of 1971 would not be above the prices charged at that time. (*Id.*, 218-219) (Def. Exh. No. 35)

Just prior to the August 15, 1971 import surcharge, Daiflon had submitted a purchase order to Daikin for R-22 and R-113. (*Id.*, 224)

In 1971 and 1972 Carter had disucssions with his Japanese suppliers with respect to the possibility of constructing a manufacturing facility in the United States. (*Id.*, 225) The plan was for the Japanese to provide a license in order that a

manufacturing facility could be built. (*Id.*, 226) Carter thereafter received a letter from the Japanese advising that they had decided not to issue a license to Daiflon at that time. (*Id.*, 226; Def. exh. No. 13)

In addition to the facilities in Tulsa and Galveston, Daiflon had warehouses in Houston, the Carolinas and Minneapolis. (*Id.*, 227) The lack of warehouses near Daiflon's sales point was not a problem in 1969-1970, but was a problem in 1971. (*Id.*, 229-230) Daiflon maintained a 600-lb. order minimum in outlying areas; however, this did not apply in the Galveston/ Houston area. (*Id.*, 230) The policy was adopted because of freight costs. (*Id.*)

Daiflon sold its gas in returnable cylinders which involved a deposit by the customer to guarantee the return of the cylinders. (*Id.*, 231) Daiflon had to maintain a $100.00 cylinder deposit on each cylinder which was used in the transportation of gas from Japan to the United States.

Some of Daiflon's customers preferred disposable cylinders because they were easier to sell and they did not require a deposit. (*Id.*, 233) In July of 1972 Daiflon received a letter from Fraker Heating and Equipment Company, Inc., a Daiflon customer, which indicated that Fraker's customers preferred that refrigerant be shipped in non-returnable, throwaway type drums. (*Id.*, 233-235; Def. Exh. No. 20) At one time Adams, Daiflon's sales manager, wrote a memorandum to Carter indicating that because Daiflon was not using disposable cylinders it was necessary to price refrigerants five cents below its competitor's prices. (*Id.*, 236)

In 1971 a customer of one of Daiflon's customers made a claim against Daiflon arising out of the sale of contaminated gas. this arose from gas sold in 1969 or 1970 (*Id.*, 242-244; Def. Exh. No. 29)

At one time Daiflon received a complaint that customers were cutting their hands on handles which were turned up on Daiflon's cylinders. (*Id.*, 244-246; Def. Exh. No. 21)

Daiflon did have problems from time to time with leak-

ers but they were of no major significance. (*Id.*, 248)

On February 15, 1971 Carter submitted a personal financial statement to the United States National Bank in Galveston which reflected the value of his Daiflon stock at $50,000.00. Carter owned 25% of the stock of Daiflon. (*Id.*, 253; Def. Exh. No. 7) At that time the financial statement of Daiflon reflected a net worth of approximately $225,000.00 predicated on the book value of the company. (*Id.*, 254)

The projection of income (Pl. Exh. No. 17) was prepared by Daiflon for internal company use and for submission to the bank for the purpose of borrowing money. (*Id.*, 265)

Carter did not have a contract either directly or indirectly with Bentley for any particular price from the Japanese. (*Id.*, 272) One of the assumptions of the statement of projected income was that Diaflon would be selling R-12 at fifty cents a pound and R-22 at seventy-five cents a pound. (*Id.*, 272-273) Daiflon's consolidated tax return for the year ended February 28, 1971 showed taxable income of $58,000.00. Carter did not know what part of that profit was attributable to sales of refrigerant gas. (*Id.*., 276-277)

For the Daiflon operation in Galveston to be profitable it would be necessary for the manufacturing facility to handle 3,000,000 pounds of gas per year. (*Id.*, 305) Carter certainly assumed that the facility could in fact handle that amount. (*Id.*)

R-11 was a very minor part of Daiflon's business. By pound, 1% to 2% would be R-11; 35% R-12, and 65% R-22. (*Id.*, 321) The sales of R-22 were higher because Daiflon was primarily selling in the service market where there was a higher demand for R-22. (*Id.*, 322) It is possible that Daiflon actually sold in 29 states, the District of Columbia and Puerto Rico rather than 31 states as Carter had previously testified. (*Id.*, 327)

(e) Re-Direct Examination

Carter did not ask the defendants to sell refrigerant gas

to Daiflon because he was competing with defendants. (*Id.*, 343-344) The collision which Carter referred to on cross examination in the Japanese harbor did not result in a loss of any cylinders. (*Id.*, 344) There were no other ship collisions. (*Id.*, 345)

The lack of R-502 hurt Daiflon's sales because some of the people to whom Daiflon sold were the repair people in the marketplace that used R-502 for supermarkets. These people were also purchasers of R-11, R-12, and R-22, and many of the customers would not buy those items if they could not also purchase R-502. (*Id.*, 345-346)

In Carter's letter to Mr. Kojima of Daikin, referred to on cross examination, he stated that an ARW wholesaler, Thermal Supply, was selling R-22 in 125-lb. cylinders at fifty-nine cents a pound and Daiflon was having a problem combatting that situation. (*Id.*, 377) Carter also indicated in that letter that Daiflon had an extensive plan which would provide a workable solution to both Daikin and Daiflon. This plan involved his attempt to build a manufacturing facility. (*Id.*, 348) Carter had visited with M.E.I., a Minneapolis corporation, to determine if financing was feasible. They indicated that it was. (*Id.*, 348)

The devaluation of the dollar would not have been a great problem to Daiflon had the price in the marketplace not been reduced by the defendants. (*Id.*, 349)

With respect to the letter of May 6, 1972 which contained Daikin's refusal to provide a license to Daiflon to manufacture Daiflon gas in the United States, the letter contained a "plan in the future" paragraph which indicated that Daikin's decision was not a turn down, but just a postponement of a final decision. Daikin indicated that it needed to reconsider how to export its technology to the United States. (*Id.*, 354)

There were many customers who wanted returnable cylinders instead of throw aways, and there were some who wanted throw aways in lieu of the returnables. (*Id.*, 355-356)

The reasons Carter did not follow the suggestion of

Mr. Fraker that Daiflon go to disposable cylinders were economic and they were "having trouble with the ecology". (*Id.*, 356) In addition Carter did not like disposable cylinders and felt at the time that the end result of the cylinder business would be back to a returnable cylinder. The lack of disposable cylinders hurt sales to some degree, but were not a serious detriment. (*Id.*, 357)

Carter's salary from Daiflon was $19,200.00 a year, which was the same salary paid to Adams.

(f) *Re-Cross Examination*

The critical problem to get a plant constructed was obtaining a license from the Japanese and the Japanese had refused to issue a license. (*Id.*, 361-362)

(2) *F. C. "Bus" Adams*

(a) *Direct Examination*

F. C. "Bus" Adams ("Adams") has been involved in sales in the heating and air conditioning industry since 1947. (Adams, 635-637) Adams is a 25% stockholder of Daiflon and is an officer of the corporation. (*Id.*, 638) In 1969 Carter and Adams decided to form Daiflon and Adams' responsibilities were to be in the area of sales. (*Id.*, 639) The geographical area in which Daiflon was selling was from the New England coast to North and South Dakota and down to the Gulf of Mexico. Generally, it encompassed the central and eastern parts of the United States. (*Id.* 639-640)

In travelling for Daiflon throughout the United States, Adams gained experience with respect to the volume of sales of the defendants, who were competitors of Daiflon. DuPont appeared to have a larger volume of sales than the other defendants. (*Id.*, 641) Adams supervised about ten or eleven sales representatives, each of which had an assigned territory. (*Id.*, 643) Adams encountered DuPont as a competitor in all of Daiflon's market area. (*Id.*, 647-648)

(b) *Cross-Examination*

During the period 1969 through 1972 Adams was Vice President of Daiflon and was essentially Carter's partner. (*Id.*, 648) Adams had the major responsibility for the sales of Daiflon products. (*Id.*, 649)

Fifty or sixty percent of the people that Daiflon dealt with preferred the returnable cylinder over the throw away. (*Id.*, 561) Daiflon was unable to sell R-502 to ISE, the association of supermarket operators who had requested that grade of gas. (*Id.*, 654) Daiflon did not lose any customers because it could not supply R-502. (*Id.*)

Adams had not sold refrigerant gas until he went to work for Daiflon. (*Id.*, 656) During the period of time in 1968 and 1969 when Carter and Adams discussed forming Daiflon, Adams made a survey with respect to the demand for refrigerant gas among those who did not have a source of supply. (*Id.*, 658-659) This was in the form of a handwritten report, which was destroyed in a fire of Adams' car in 1969 or 1970. (*Id.*, 660)

In 1971 neither Carter nor Adams sought marketing studies or marketing assistance from outside professionals with respect to the operation of Daiflon. (*Id.*, 661-662) Apart from Adams Daiflon had two other salaried salesmen. (*Id.*, 665)

When Carter and Adams formed Daiflon they considered the possibility that, as a new entrant in the market, they would encounter competitive price situations. (*Id.*, 670) When Diaflon first commenced operations it sold only to distributors that could not purchase refrigerant from the defendant manufacturers. (*Id.*).

Adams identified a personal financial statement dated February 16, 1971 (Def. Exh. No. 8) It shows the value of his Daiflon stock as $50,000.00.)*Id.*, 696; Def. Exh. No. 8) At that time he had a 25% ownership in Diaflon. (*Id.*, 697)

In connection with the employment of sales representatives, which was Adams' responsibility, he would first travel

an area and ask wholesale distributors for names of good manufacturers' representatives. After a representative was employed, Adams would travel with him in the area and introduce him to the wholesale distributors and new customers (*Id.*, 724-725)

Daiflon made a study of the use of returnable vs. disposable cylinders. That document is not now available. It showed that Penn Engineering (one of the repackers) was doing a tremendous business with their returnable cylinders at that time. (*Id.*, 753-754) This was in 1969 and 1970. (*Id.*) The study also showed that customers that Adams had contacted were having a few problems with the throw away cylinders in regard to the service valve. Others just did not like the throw aways. (*Id.*) Daiflon determined to continue operating with the returnable cylinders because they were better cylinders with better service valves, and their continued use would be less costly than a transition to throw aways. (*Id.*, 754)

In addition to competing against the defendant manufacturers Daiflon competed against the ARW-type wholesaler. (*Id.*, 756-757) In some instances Daiflon sold directly to mechanical contractors. (*Id.*, 758) This was done primarily when Daiflon was phasing out its product and getting ready to close the plant. (*Id.*, 758—759)

When Daiflon went into business in 1969 it sold gas at the same price that the defendants were selling to the wholesalers. (*Id.*, 764) Daiflon was selling primarily to wholesalers that could not purchase from the defendants (*Id.*, 765) Adams' judgment with respect to the comparative volume of refrigerant gas sold by DuPont relative to the other defendants was based upon information obtained from individuals that he has known for several years. (*Id.*, 772) That information did not come from any representatives of the defendants; rather, it was from large wholesale distributors of gas. (*Id.*, 772-773)

(c) *Re-Direct Examination*

DuPont's approximate share of the market in which Daiflon operated was over 50%. This observation is based upon discussions with the presidents of the companies that purchased gas from DuPont. (*Id.*, 775) Daiflon could offer a regular line of refrigerant gas to wholesalers who could not obtain gas from the defendants. (*Id.*, 776)

During the time period 1969-1971 Daiflon's competitors were having difficulties with disposable cylinders. (*Id.*, 781)

R-502 is used in the supermarkets and DuPont had a patent on this refrigerant up until approximately 1970 "so they had the full control of it, and we could not get 502". (*Id.*, 782) However, all the defendants were selling R-502 in the United States. (*Id.*, 787-788) Daiflon had customers that ceased to buy R-12 and R-22 from Daiflon because Daiflon "didn't have 502". (*Id.*, 785)

Adams never instructed or employed or ordered any person to take pictures of the plants of competitors. (*Id.*, 786) Nor did he employ, instruct or have knowledge of any Daiflon employee preparing an analysis of the cost of refrigerants to Daiflon's competitors. (*Id.*, 787)

(3) *R. D. McDonald*

(a) *Direct Examination*

R. D. McDonald ("McDonald") is Vice President and Secretary of the A. Y. McDonald Manufacturing Company, which is a manufacturer and wholesale distributor or plumbing, heating and air conditioning equipment. (McDonald, 515) Carter formerly worked for the A. Y. McDonald Company. McDonald first met Carter during Carter's employment with A. Y. McDonald, and became reacquainted with Carter in the late 1960's through Adams. (*Id.*) For the period 1965 until 1972 McDonald was branch manager for A. Y. McDonald in Dubuque, Iowa. During that time he received requests from his customers to purchase refrigerant gas. (*Id.*, 516-517) However, A. Y. Mc-

Donald was unable to purchase refrigerant from defendants. (*Id.*, 517) A. Y. McDonald was able to purchase refrigerant from Penn Engineering until the time that it acquired refrigerant from Carter Supply. (*Id.*, 518) Subsequently, his company purchased refrigerant from Daiflon. (*Id.*, 519)

In the late 1960's McDonald talked to Carter and Adams with respect to his possible participation as an investor in Daiflon. (*Id.*, 521-522) At that time he had meetings with representatives of Daikin-Kogyo, Daikin's Japanese exporter and Mr. Bentley of Western Supply. (*Id.*, 521) He checked with some of A. Y. McDonald's dealers to determine whether there would be a resistance to purchasing gas from Japan and determined that the Japanese had an excellent reputation for quality products. (*Id.*, 522)

McDonald invested a total of $200,000.00, $100,000.00 as equity and $100,000.00 as debt. Since his investment he has served as secretary-treasurer of Daiflon. (*Id.*, 523) Daiflon secured a line of credit in the original amount of $400,000.00 from the U.S. National Bank of Galveston, and after the relationship progressed the line of credit was increased to $500,000.00. (*Id.*, 524)

In early 1970 Daiflon had a very sound financial condition with a line of credit of $400,000.00, additional working capital of $100,000.00 in the form of a loan, $100,000.00 which McDonald had invested for his stock, and Carter and Adams had each put in $50,000.00. (*Id.*, 524-525) Carter's contribution was in the form of equipment and assets of Carter Supply which were transferred into Daiflon. (*Id.*, 525) Daiflon had 200 shares of stock outstanding. McDonald owned one-half of the stock; Carter and Adams each owned 50 shares. Carter and Adams pledged their stock to McDonald as security for his loan to the company. (*Id.*)

Daiflon's main problem initially was acquiring enough product to sell. Daiflon had orders for all the gas which

could be purchased from the Japanese. (*Id.*, 536) Daiflon's sales continued to increase until the latter part of 1971 at which time "we just weren't able to sell anything anymore". (*Id.*) In early 1971 McDonald was in Galveston and all of the storage tanks were practically full at that time. (*Id.*, 536-537) Subsequently, Daiflon's bank in Galveston required an orderly liquidation. (*Id.*, 539) It was agreed that Carter would liquidate the company, rather than having the assets sold by the bank. (*Id.*, 540-541) The bank received the proceeds from the sale and assumed the accounts receivable. (*Id.*, 541) Customers were directed to send payment on their invoices directly to the bank. (*Id.*) In October of 1972 Daiflon's indebtedness to the bank was over $300,000.00. (*Id.*) The indebtedness today is in excess of $500,000.00 because the debt has continued to accrue interest. (*Id.*, 542) Additionally, there is trade debt of approximately $50,000.00 to $100,000.00.

McDonald met with Carter and Adams on several occasions with respect to the possibility of establishing a manufacturing plant. (*Id.*, 542-543)

Daiflon had over 1,000,000 pounds of gas in inventory in 1971 at the time that it ran out of customers. (*Id.*, 552)

(b) *Cross Examination*

McDonald's advanced $100,000.00 to purchase the stock and $100,000.00 in the form of a loan at approximately the same time. (*Id.*, 556-557) He has not made demand upon either Daiflon, Carter or Adams for payment of the note. (*Id.*) McDonald believes that the $100,000.00 which he paid for his stock was a fair price. It was arrived at by arms length negotiations with Carter and Adams. (*Id.*, 559)

Initially, Daiflon maintained a $100,000.00 certificate of deposit at the Galveston bank. (*Id.*, 561) In 1972 the Galveston bank requested that McDonald personally guarantee Daiflon's note, but he declined to do so. (*Id.*, 562) Prior to his contribution of $200,000.00 to Daiflon, Mc-

Donald was aware of Daiflon's business plan and was aware of the prices which Daiflon was charging to its customers. (*Id.*, 574-575) At the time he advanced the $200,000.00 McDonald knew that Daiflon was obtaining its product from Japan, and he had talked to the Japanese several times prior to the time that he made his investment. (*Id.*, 578) He was aware that there was a risk in buying products from a foreign country because of the possibility of devaluations, changes in the duty, or surcharges. (*Id.*, 579)

Daiflon did not attempt to purchase any product after August 15, 1971 because of the difficulties in selling it at that time. (*Id.*, 585-586)

A manufacturer or repackager sells to a wholesaler to get wider distribution of his product. (*Id.*, 589) The wholesaler also handles the credit for the manufacturer and probably has a more concentrated sales force. The wholesaler is closer to its customers and can assemble the goods in one location for one-stop service. (*Id.*, 589-590) McDonald did not think that the reason Daiflon went out of business was that its costs of operations were extraordinarily high. (*Id.*, 609)

(c) *Re-Direct Examination*

The full effect of the March, 1971 price reduction by defendants was felt by Daiflon in June of 1971. By the end of June, sales had fairly well dried up and there were very few sales in August. (*Id.*, 617)

The reason that McDonald declined to personally guarantee Daiflon's note as requested by the Galveston bank in 1972 was that he did not think that his personal guarantee of Daiflon's indebtedness would have "saved Daiflon". (*Id.*, 622) Furthermore, McDonald was not financially able to pay the indebtedness and the only advantage in his signing the note would have been to the bank. (*Id.*, 623)

The surcharge imposed upon imports in the United States was merely an additional cost of doing business and

is similar in effect to the cost of inflation. (*Id.*, 624) Daiflon received assistance from the Japanese in particular instances where they had price adjustments. (*Id.*) Daiflon's note to McDonald for his $100,000.00, dated May 28, 1971, was prepared one year after the time that McDonald advanced the funds. During the first year Daiflon paid the interest to McDonald which was approximately $16,000.00 or $17,000.00. (*Id.*, 627)

A-X. *Exhibits Relating to the Testimony of Daiflon's Principals.*

Among those exhibits introduced during the testimony of Carter was a Projected Statement of Income for the period March 1, 1979 to February 28, 1972. (Carter, 198; Pl. Exh. No. 17) In that projection Carter took into consideration the selling expense which he anticipated, the freight, automobile expense, entertainment expense and even postage and the expense of printed matter. (*Id.*, 201) Payroll taxes were computed and applied. (*Id.*) Additionally, Mr. Carter took into consideration, in determining his direct costs, such items as importer fees, customs, duties and general and administrative expense. (*Id.*, 202) He computed the expense of utilities, insurance, interest and a bad debt reserve. (*Id.*, 202) Consideration was given to bank service charges and legal and accounting fees. (*Id.*) He determined a figure of net income before taxes at $200,897.12. (*Id.*, 204) .

Other exhibits introduced by Daiflon included a price sheet for Daiflon products dated December 1, 1970 (Pl. Exh. No. 4), Daiflon's price sheets of August 21, 1971 and September 1, 1971 (Pl. Exh. Nos. 18 and 19). Daiflon also introduced its financial statement of February 28, 1971 and its federal and state income tax returns for the years ending February 28, 1971, 1972 and 1973. (Pl. Exh. Nos. 5, 24 and 25)

During the course of the McDonald testimony, Daiflon introduced several enlarged photographs which Mc-

Donald took of the Daiflon facility in late 1970 or early 1971. (McDonald, 530-536; Pl. Exh. Nos. 44-51)

The court excluded all evidence presented by Daiflon, both testimonial and documentary, relating to Daiflon's plans to build a manufacturing facility. Among items excluded were Pl. Exh. No. 32 which was Daiflon's projection of annual income and expense for the operation of a 20,000 ton per year manufacturing facility. The projection included estimate of gross sales, costs of goods sold and selling expenses and reflected a net profit from sales of $4,740,710.00. Net income estimated at page 2 of the exhibit after taxes is $2,259,908.00. That exhibit also included a detailed statement of the projected costs of products to be manufactured. Furthermore, the court excluded Pl. Exh. Nos. 42 and 43 which are executed contracts between Daiflon and Dow Chemical relating to the supply of raw materials for Daiflon's use in connection with its manufacturing facility.

B. *The DuPont Witnesses*

(1) *Robert Wright, Jr. (by deposition taken June 19, 1973 in Wilmington, Delaware)*

Robert Wright, Jr. ("Wright"), at the time his deposition was taken, was Marketing Manager, Refrigerants for DuPont, and had served in that capacity since August of 1970. (Wright Depo., 4) His predecessor in that position was R. M. Glover. Wright's duties involved sales and planning for refrigerants, fire extinguishants and food systems. Wright was associated with DuPont's refrigerant gas division from 1956. DuPont maintains files for each of its customers, which include, *inter alia*, competitive price authorization forms. (*Id.*, 8) The competitive price authorizations, referred to as "CPA's", were maintained in the refrigerant section under Wright's supervision and direction. (*Id.*, 9)

DuPont maintained files for some of its competitors, and maintained a file for Daiflon. (*Id.*, 10, 12-13) The

Daiflon file was in Mr. O'Donnell's desk. (*Id.*, 13) As of August, 1970 Wright was responsible for recommendations and changes in the pricing practices and policies of DuPont.

During the period 1956 to 1962 pricing of refrigerant gas was fairly uniform or stable. There were price changes but nothing comparable to the situation experienced during the period 1969 through 1972. (*Id.*, 21)

DuPont maintains manufacturing facilities for refrigerant gas in East Chicago, Indiana; Louisville, Kentucky; Antioch, California. Also, there are approximately 40 warehouse locations around the country and their locations are dependent upon distribution needs. (*Id.*, 22-23) DuPont's distribution pattern for refrigerant gas involves the filling of cylinders at the plant location and subsequent shipment of cylinders to warehouses. Cylinders are marketed only through wholesalers. (*Id.*, 24) A wholesaler is a firm that engages in the distribution of products to the service and contracting trade, industrial firms, and does not engage in service work. (*Id.*) DuPont has refused to sell gas to certain wholesalers in cities where it was determined that DuPont had adequate distribution. (*Id.*, 25-26) Refrigerant is sold to repackagers in bulk, and cylinders are distributed only to wholesalers and the government. (*Id.*, 26-27)

DuPont has "drop shipments" of ton cylinders which are replacement charges for specific pieces of equipment for which the contents of the ton would be consumed. (*Id.*, 28-29) The policy of drop shipping directly to the work site for end use is based upon DuPont's policy with respect to the safety and quality of the refrigerant. DuPont wants the contents of the ton to be put in the system and not refilled for other purposes. (*Id.*, 29)

DuPont has allowed discounts on cylinder deposits. Sales to Standard Brass are an example of this "very discouraging practice". (*Id.*, 39) DuPont engaged in this

practice "to be competitive". (*Id.*) Daiflon was not one of the competitors which DuPont met with respect to the discounts on cylinder deposits. (*Id.*) To Wright's knowledge DuPont never directly met Daiflon in a competitive situation because Daiflon did not sell DuPont's customers. (*Id.*, 39-40)

Various types of off-list pricing arrangements which Wright had knowledge of included truckload discounts for less than truckload shipments, extension of terms, straight discounts, finders fees with respect to the sale of refrigerants in ton and in bulk, trip programs for wholesalers, and the allowance of leaking credits for non-leaking cylinders. (*Id.*, 42-45) DuPont never participated in the "leaker program". (*Id.*, 45)

DuPont did not initiate any off-list discount or other pricing concession. (*Id.*, 47)

DuPont provided suggested resale price sheets to its wholesalers. (*Id.*, 50) The purpose of suggested resale prices is to comply with customer requests to give them some guide with their customers. Normally, DuPont suggested a percent mark-up of 25% to 30%. (*Id.*, 51) Before allowing DuPont to meet a competitive price situation from a competitor, the DuPont salesman has the burden of trying to determine from the customer exactly what the competitive situation is. The salesman attempts to secure invoices, but generally the information is "word of mouth from the customer". Management's approval of the salesman's recommendation to meet a competitive situation depends upon DuPont's status of penetration in that area together with its belief with respect to the credibility of the particular customer. (*Id.*, 53) Wright approves the salesman's recommendation and Don Miller from DuPont authorizes the arrangement based upon Wright's recommendation.

Wright first became aware of the entrance of Daiflon into the refrigerant gas market in the fall of 1970. (*Id.*, 62)

DuPont checked to see how much refrigerant Daiflon was importing, and this was primarily the responsibility of Mr. O'Donnell, the Sales Manager, Field Distribution. (*Id.*, 62-63) O'Donnell prepared written reports with respect to Daiflon and one report involved the history of Daiflon. O'Donnell was attempting to determine "how big a factor Daiflon might be". (*Id.*, 64) Wright was involved in refrigerant staff meetings over a period of time in which Daiflon's entry into the market was discussed. (*Id.* Daiflon was certainly discussed in late 1970 and early 1971. (*Id.*, 66)

DuPont concluded that Daiflon was a fairly small activity and regional in nature, and DuPont was not really concerned with it. (*Id.*, 66-67) DuPont tried to estimate what Daiflon was paying the Japanese manufacture for its gas in order to determine whether the price was lower than what the Japanese manufacturer was selling its product for in Japan. (*Id.*, 67) DuPont could not justify a dumping complaint against Daikin with the federal government. (*Id.*, 67-68)

DuPont's investigation revealed that Daiflon was active in the southwest and in the Minneapolis area, but DuPont chose not to be concerned with this activity. (*Id.*, 68-69) There may have been "a test or two made" of Daiflon gas by DuPont. (*Id.*) Wright does not recall any conclusions that were reached with respect to the quality of the Japanese gas that was being imported. (*Id.*, 70)

DuPont sells Penn Engineering refrigerant gas in bulk and Penn Engineering repackages the gas into 25 and 50-lb. cylinders. (*Id.*, 72-73) Wright had no knowledge as to whether Penn Engineering's repackaging practices differ from Daiflon's. (*Id.*, 73) DuPont has approximately 80% of Penn Engineering's business, and the balance goes to Kaiser. (*Id.*, 76) There is no pricing schedule as to Penn Engineering, and DuPont's pricing is the same as to all repackagers. (*Id.*, 77-78)

It has not always been the practice of the defendants

to follow the pricing sheets of other defendants during the period 1969 through 1972. (*Id.*, 84-85) In the fall of 1972 when Union Carbide raised prices DuPont's calculation of the 8% limitation imposed by the governmental price authorities did not allow DuPont to raise prices on three or four specific cylinders to the extent Carbide raised prices. (*Id.*, 85). However, DuPont did raise some products to the same level as Union Carbide in October, 1972, including 145-lb. cylinders of Freon 12. DuPont merely met the Union Carbide price sheet with respect to that price. (*Id.*, 88-89) At that time DuPont was trying to approach the price schedule in effect prior to the March 15, 1971 reduction. (*Id.*, 90)

DuPont initiated the price reduction of March 15, 1971. (*Id.*, 91) The reduction was based "on existing competitive activities at that time". (*Id.*)

DuPont met Union Carbide's price for R-12 in 145-lb. cylinders in October, 1972 because it was satisfied with that price. (*Id.*, 93) DuPont's profits had eroded considerably because of increased costs and reduced prices. DuPont was under pressure to get the refrigerant profits up. (*Id.*, 93) Wright was satisfied that the profit resulting from the October, 1972 increase was a "step in the right direction". (*Id.*, 94)

Allied Chemical reduced prices in March, 1972 and DuPont "met a competitive decrease". (*Id.*, 98)

In March, 1972 Allied Chemical's price reduction involved a decrease on the "common products" and an increase on the "uncommon products". The uncommon products are R-113, R-114, and R-500. The "common products" which were reduced include R-12 and R-22. (*Id.*, 113) Wright testified with respect to the March, 1972 reduction:

"Q. Why would you lower prices on the common products, and I presume you are including 12 and 22 in that group?

A. Yes.
Q. And increase them on the uncommon products?
A. I can't presume to suggest why Allied did this.
Q. I am asking you —
A. Why did we meet them?
Q. Why did you meet — or did you meet their schedule?
A. Oh, yes, we met them.
Why we met them? We met them because at that point, again, we were under severe profit pressure. Prices were dropping —"

* * *

"A. (continuing) Prices were below our March 15 schedule of '71. We were meeting deals. We would have been very pleased to have been able to get the price up, and at least gain some of our profit back. Competitive conditions certainly precluded this, in our best judgment.

So, when Allied came out and lowered the major products, which was a substantial lowering, another five percent if you will, They did take the so-called slow-moving produced and raise them back to the level that existed prior to our March 15 reduction." (*Id.*, 113-115)

Wright attends trade association meetings such as ARW, ARI, and ASHRAE. At these meetings Wright had an occasion to see competitors' representatives but did not generally visit with them. (*Id.*, 175-176)

Because of the March, 1972 price decrease it was necessary for DuPont to sell some of its refrigerants below cost, but Wright does not recall which specific products were sold below cost. The sales were made below a "full cost" basis. (*Id.*, 178) Full costs means all costs including distributive costs, out-of-pocket costs, raw material costs, and excess labor that is required to produce the product. (*Id.*) The reason DuPont sold below cost in 1972 was be-

cause it was necessary to meet competition and maintain sales penetration. (*Id.*, 179) In 1972 DuPont's share of the wholesaler market was between 45% and 50%. Union Carbide had 14%, Allied had 21%, Racon had 7%, and Pennwalt had 8%. (*Id.*, 183) DuPont has tried to keep its market share the same since Wright has been in the refrigerant end of the business. (*Id.*, 184)

The 13% decrease of March, 1971 was not put into the form of a price bulletin, and customers learned of the reduction by "word of mouth". (*Id.*, 186) This was an unusual practice for DuPont, and DuPont has not accomplished price changes in this manner either before March 15, 1971 or following that time. (*Id.*, 186) The reason for the "word of mouth" change was to move quickly and quietly ahead of competition. (*Id.*, 187) Prices were reduced in March of 1971 because DuPont's penetration was failing in the field distribution area. (*Id.*, 187) DuPont concluded that the reason for this situation was the overcapacity of fluorocarbons in relation to the sales volume. DuPont's competitors were aggressively pricing at lower levels to get more volume. (*Id.*, 188)

DuPont was cognizant of Daiflon's entry into the market and was watching it, but the volume was so small it was not considered. (*Id.*, 190) DuPont did consider the fact that the distribution pattern which Daiflon was initiating was disruptive to DuPont's methods of marketing; however, so long as there was not any significant volume, DuPont was not concerned. However, DuPont "had to watch it". (*Id.*) DuPont was disturbed about Daiflon's distribution methods because Daiflon was selling the customers of DuPont's customers. The price at which such sales were being made was substantially under the prices at which DuPont's customers were selling. (*Id.*) Wright could not recall a particular instance in which Daiflon was selling refrigerants at such prices; however, he believed that such sales were made "in several cases". (*Id.*, 191)

(b) *Cross Examination*

The reason DuPont sold below cost in 1972 was to meet competition in order to maintain volume. (*Id.*, 194) DuPont was selling at a profit on an incremental basis. However, applying the full cost to each pound, DuPont records would show a net loss on that pound. (*Id.*)

DuPont did not have any discussion with any competitor prior to the initiation of the price reduction in March, 1971. (*Id.*, 195) To Wright's knowledge the March, 1971 price reduction was a complete surprise to the competition, which was precisely the move which DuPont wanted to make. (*Id.*) The 13% reduction in March of 1971 was in effect and a net 8% reduction, for the reason that other discounts were eliminated. (*Id.*, 196-197)

It is not DuPont's policy to initiate off-list price deals. (*Id.*, 197) DuPont's policy is in general to have the same price for everybody, to treat everybody the same unless DuPont decides to meet a specific competitive situation. (*Id.*) The March 15, 1971 price reduction applied to all wholesale customers, but did not put an end to all of the off-list discounts and other pricing concessions. (*Id.*, 198) DuPont was aware of Daiflon's existence at the time that it initiated the March, 1971 reduction. However, Daiflon's existence was not a factor in that decision, and DuPont never met Daiflon directly on any account. (*Id.*, 198-199) DuPont was not selling to the same people Daiflon was selling. (*Id.*) DuPont has met Daiflon "indirectly" on certain occasions, in March of 1971 and on one occasion prior to March of 1971. (*Id.*, 199)

Wright has never made a telephone call to any of his competitors to verify a reported offering that a competitor was supposed to be making to any customer. (*Id.*, 204)

At the trade association meetings which Wright attended there was no discussion regarding pricing, discounting or deals on refrigerants. (*Id.*, 205) Wright has no knowledge with respect to whether anyone at DuPont had

any price discussions with any representative of Union Carbide prior to the October, 1972 price increase. (*Id.*, 207)

(c) *Re-Direct Examination*

When Wright met with Mr. Napoli and other employees of competitors, the opportunity existed to discuss prices. However, at the ARI meetings there is legal counsel present at all times and counsel would not allow such discussion. (*Id.*, 207)

(2) *Patrick V. O'Donnell (By deposition taken June 19, 1973 in Wilmington, Delaware)*

(a) *Direct Examination*

Patrick V. O'Donnell ("O'Donnell"), at the time of the taking of his deposition, was Sales Manager for Field Distribution for DuPont. (O'Donnell Depo., 4) O'Donnell has held that position since November of 1969 and prior to that time he was in Houston, Texas where he was a salesman, then sales supervisor, and finally field sales manager. (*Id.*, 5-6) As national sales manager for field distribution O'Donnell's responsibilities include forecasting future sales and insuring that DuPont's customers have been well taken care of with respect to delivery of product, product quality, and containers. (*Id.*, 7) He is also responsible for sales trainees to make sure they are properly trained when they go into the field. (*Id.*, 7-8) As national sales manager, O'Donnell is consulted with respect to market conditions, and makes recommendations to Wright. (*Id.*)

O'Donnell commenced keeping a file on Daiflon in 1970. (*Id.*, 10)

O'Donnell was aware of the fact that Penn Engineering had been selling to Carter at one time although he did not know they were selling Freon to Carter. (*Id.*, 13) Carter was not an authorized Freon distributor. (*Id.*) In the 1960's O'Donnell advised Carter's company that they were not an authorized Freon distributor and they should not use the name Freon in their advertising. (*Id.*, 16)

O'Donnell conducted some research on Daiflon as a

potential competitor in 1970. (*Id.*, 21) O'Donnell conducted the research because it was his responsibility to know the marketplace, where DuPont stood, and the potential effect of a company entering the marketplace. (*Id.*, 22) O'Donnell accumulated pricing schedules from Daiflon from all over the country; he attempted to determine whether Daiflon was selling wholesalers, whether they were selling contractors and servicemen, what their prices were, and what their sales volume was. This was done to determine what "they would be doing in the marketplace". (*Id.*, 22) O'Donnell made a report of his findings to Mr. Johnson. The fact that Daiflon was selling to contractors did not cause O'Donnell any concern, nor was he concerned with the fact that Daiflon sold wholesalers and end users at the same price. (*Id.*, 25) However, he did believe that it would make a difference to DuPont's wholesalers or distributors. (*Id.*) O'Donnell was concerned that DuPont's wholesalers could not compete with Daiflon because the Daiflon price sheet with which he was furnished showed that Daiflon was selling the end user at a price that was lower than the price that DuPont was selling to its wholesalers. (*Id.*, 28-29)

O'Donnell wrote letters to all of DuPont's refrigeration sales representatives to determine if Daiflon "had any position in the marketplace". (*Id.*, 32) All of DuPont's salesmen received O'Donnell's inquiry. (*Id*, 32-33) O'Donnell could not recall whether DuPont had an occasion to test the Japanese product during the last four to five years. (*Id.*, 34) O'Donnell had no reason to believe that Daiflon's product was not comparable to the products of the domestic manufacturers. (*Id.*, 34-35)

In December of 1972 DuPont went along with the same price as Union Carbide. (*Id.*, 39)

"Q. So you, in effect, just decided whatever the Union Carbide Price, you were going to meet that price.

A. That's right.

Q. And you didn't have any discussion with whether or not you should go higher or lower, than that?

A. I would say we had, yes.

Q. What discussion did you have?

A On the economics. I have forgotten right now, but purely involved on the economics of our costs, and what our profit situation was at the particular time.

Q. Now, with respect to, say, the Union Carbide prices for R-12, you do recall that you met whatever price they came out with?

A. Yes." (*Id.*)

DuPont initiated the March, 1971 price decrease because it had to meet the prices that competitors were charging in the field. (*Id.*, 45) The 13% discount was not really 13%; there was a 5% prompt payment discount which was eliminated. Therefore, the price decrease was only 8%. (*Id.*, 46)

DuPont has no specific policy as to how price changes are communicated. (*Id.*, 91) The reason for the March, 1971 price decrease was because DuPont was losing position in the marketplace, and more than 50% of DuPont's business was going at reduced prices. (*Id.*, 91-92) DuPont had flexibility in applying the 13% discount. The customer could take it monthly, quarterly or annually — whenever the customer wanted. (*Id.*, 98)

O'Donnell regularly attended trade association meetings and had an occasion to see his competitors there. At no time did they discuss foreign gas. (*Id.*, 128-129)

During the period 1969 through 1972 there was an overcapacity in the refrigerant industry. This capacity covered the total market and resulted from the expansion of various manufacturers. (*Id.*, 162) DuPont was in the process of building additional manufacturing facilities during that period. (*Id.*) At the time that prices were raised in October of 1972 there was an oversupply of refrigerant, but the price

was not related to that condition. (*Id.*, 163) Rather, it was related to the increase in cost, and DuPont's capacity to produce refrigerant had no relationship to the price move. (*Id.*, 163-164)

(b) *Cross Examination*

In October of 1972 O'Donnell was aware of the overall costs of production, but not the costs of producing an individual product in a particular container size. (*Id.*, 165) Messrs. Merkel, Wright and Richey of DuPont had information with respect to individual costs for particular products.

B-X. *The DuPont Exhibits.*

Among the more significant documents produced by DuPont during the course of the pre-trial proceedings and introduced by Daiflon at trial are the following:

Pl. Exh. Nos. 1224 and 1236: Pl. Exh. No. 1224 — letter dated May 12, 1970 from T. Nonaka, Special Assistant to Marketing Manager, DuPont Far East, Inc. — Japan, to William R. Hess, Overseas Marketing Assistant, for DuPont in Wilmington, Delaware. Pl. Exh. No. 1236 — letter from William R. Hess dated February 2, 1971 to S. Takada of Mitsui Fluorochemicals Co., Ltd., in Tokyo, Japan, with attached telexes dated February 2, 1971 and February 3, 1971 between Hess and Nonaka with copies to O'Donnell. These exhibits expressly disclose that during the period June, 1970 through February, 1971, DuPont engaged in an investigation of freight rates from Japan to various locations in the United States, including Houston, Texas.

Pl. Exh. Nos. 1259, 1264 and 1265: These exhibits are telexes dated during the months of November and December, 1971 which represent communications between Takada and DuPont Wilmington with respect to the prices paid by large Japanese customers for R-11, R-12 and R-22.

Pl. Exh. Nos. 1005 and 1007: Pl. Exh. No. 1005 — letter dated January 13, 1970 from Drexel L. Daily, Vice

President and General Manger of Wittichen Supply Company to Mr. W. W. Ranson, Sales Manager, Refrigerants for DuPont in Wilmington, which indicates that: "Jap gas is well represented in this area and sold under the trade name 'Daiflon'." Mr. Daily then advises Wilmington of the current prices and requests their assistance "before our problem becomes your problem". Mr. Ranson replied to Daily's letter on January 26, 1970, with blind copies of the letter to R. M. Glover and R. W. Richey. (Pl. Exh. No. 1007) A copy of Pl. Exh. No. 1007 is attached in its entirety as Exhibit "A" to this Narrative Statement of the Case.[1]

Pl. Exh. No. 1044: Memorandum dated April 7, 1971 from O'Donnell to all of DuPont's sales representatives (with copies to Wright and others), with respect to the practice of the sale by Daiflon of ton cyinders directly to contractors who then are able to refill the containers into smaller cylinders, contrary to the established pattern of distribution. A copy of this exhibit is attached as Exhibit "B" to this Narrative Statement of the Case.

Pl. Exh. No. 1062: Copy of the inter-office correspondence from Luther Cox of Virginia Chemicals, DuPont's sales agent, to O'Donnell dated April 30, 1970 relating to the effect of the March, 1971 price reduction upon Daiflon. A copy of this exhibit is attached as Exhibit "C" to this Narrative Statement of the Case.

Pl. Exh. No. 1065: Freon products division trade report prepared by DuPont salesman D. B. Hartman in Birmingham, Alabama for distribution to Wright, O'Donnell and other members of Wilmington management, regarding a sales call of April 30, 1971 to Mr. Robert Gennett, President of Refrigeration Supplies Distributor, a DuPont wholesaler. Mr. Hartman states: "Mr. Gennett is causing

[1]The underlining which appears on this exhibit, as on others which are being appended hereto, was done by Daiflon's counsel at the court's instructions prior to a ruling by the court with respect to the exhibit's admissibility.

quite a stir in the market in the Birmingham area. He is passing on the 13% discount which we offered in order to combat the Japanese refrigerant." A copy of this exhibit is attached as Exhibit "D" to this Narrative Statement of the Case.

Pl. Exh. No. 1095: Letter dated February 8, 1972 from O'Donnell to L. J. Lichtenauer of Forslunds, a DuPont wholesaler, thanking Mr. Lichtenauer for the Daiflon price sheet which he had forwarded to DuPont: "We are deeply concerned and I assure you we are endeavoring to find a solution."[2]

Pl. Exh. No. 1104: Four-page hand-written report from O'Donnell to T. D. Johnson which was produced and testified to by O'Donnell during the course of his deposition. The report is titled "Daiflon Imports to the U.S.A." and generally relates to Daiflon's business activities during the years 1969 and 1970.

Pl. Exh. Nos. 1154, 1160, 1161, 1166, 1179, 1180, 1181, 1184, 1185, 1186, 1189, 1192, and 1194:

These exhibits are DuPont's competitive price authorizations (CPA's) which relate to DuPont's off-list pricing arrangements with several of its large customers. The CPA's contain information relating to the current DuPont selling price, type of adjustment, requested, related details justifying the adjustment requested, details with respect to the competitive offer and date "if known", a description of the major suppliers to the customer, DuPont's per cent of penetration, the effect of the competitive offer, and the total annual of refrigerant pound volume purchased by the ac-

[2]It should be noted that this letter postdates by over six months the surcharge on imports and change in currency relationships between the United States and Japan which defendants contend were responsible for Daiflon's demise.

count. These pricing arrangements were approved by Wright.[3]

Pl. Exh. Nos. 1321, 1322, 1323, 1325, 1326, 1329, 1330, 1335, 1336, 1337, 1339, 1340, 1341, 1342, 1343, 1344, 1346, 1347, 1348, 1351, 1353, and 1354

These are the so-called DuPont "Dear John" letters whereby DuPont responds to the various companies throughout the United States who have asked to become distributors of DuPont refrigerants. In each instance the request is denied on the basis that DuPont has "adequate distribution" in the area. The letters are essentially form letters.

Pl. Exh. Nos. 517-521: Plaintiff introduced with respect to DuPont, as other defendants,[4] all published price sheets relating to the sale of DuPont refrigerants in the replacement market during the period 1969 through 1972.

B-XY. *DuPont Exhibits Excluded by the Court.*

During the course of trial the district court excluded 49 DuPont documents which were offered as Exhibits by Daiflon. Among the more significant exhibits excluded were the following:

Pl. Exh. Nos. 1363 and 1364: "Shorthand Notebooks" (diaries) of DuPont refrigerant executive R. M. Glover for the years 1969 and 1970. The diaries contain several entries relating to Daiflon specifically and generally to DuPont's pricing and marketing practices during the period of time that Daiflon competed in the marketplace. For example, on January 2, 1970, Glover notes:

"Allied say going along on price increase. Pennwalt

---

[3]As will be recalled from the deposition testimony of Wright, it was DuPont's position at trial that they did not at any time initiate discounts, rebates, or any other pricing arrangements to a customer, and that all such concessions were made only to meet a competitive offer by another defendant. The CPA's are generated by DuPont to document each instance of off-list pricing.

---

[4]The exhibit numbers for the price sheets of the defendant manufacturers are as follows: Union Carbide — Pl. Exh. Nos. 501-503;

will go along on price increase buy say the plan to increase penetration." (Ex. 1363, p. rg 12b[5])

Three days later Glover makes the following entry:

"George L. Johnston (member of Racon Board of Directors) confirmed new Allied prices — rec'd in mail this morning. The price is same as ours except 11 bulk not mentioned and include ton price on 11 and 12." (exh. 1364, p. rg 13 V)[3]

C. *The Virginia Chemicals Witnesses.*

(1) *R. B. Ward (By deposition taken January 30, 1974 in Portsmouth, Virginia)*

(a) *Direct Examination*

At the time his deposition was taken, R. B. Ward ("Ward") was Field Sales Manager for the Refrigeration Department of Virginia Chemicals. (Ward Depo., 4) R. M. Glover, during the 1969 to 1972 period was manager of Freon Products Division of DuPont. (*Id.*, 11) During the period 1969 to 1972 Ward communicated regularly with O'Donnell of DuPont, and transmitted to him information collected by Virginia Chemicals which would be of interest to DuPont. (*Id.*, 14) Virginia Chemicals assists DuPont salesmen in selling freon refrigerants and serving customers. However, the refrigerant product is sold directly by DuPont from DuPont warehouses. (*Id.*) Virginia Chemicals' territory for DuPont is the entire United States. (*Id.*, 14-15)

Agents for Virginia Chemicals worked together with DuPont salesmen in making sales and then received commissions based on the national sales of refrigerants. (*Id.*, 17-18) At pages 20 to 79 of Ward's deposition testimony he describes various documents produced by Virginia Chemicals at the time of his deposition pursuant to a subpoena

---

[3]The uncontroverted evidence at trial was that defendants uniformly raised the prices of refrigerants effective February 1, 1970 as reflected by price sheets published by all defendants in late January, 1970 — subsequent to the communications reflected in Glover's diary.

duces tecum. Many of these documents are discussed in Section C-X and C-XY, *infra.*

Virginia Chemicals did not sell, on behalf of DuPont, to service people, "because we only sold the wholesalers who in turn sold to service people". (*Id.*, 81) Virginia Chemicals would not sell to service people since it was not their "method of distribution". (*Id.*) The method of distribution during the period 1969 to 1972 was "to sell through wholesalers who were not in any way in the contract or service business".

One-ton cylinders were sold directly to the jobsite since this was DuPont's policy and was printed on the DuPont price schedule. (*Id.*, 83) One-ton cylinders would not be shipped to or warehoused by DuPont wholesalers. This order was to discourage reloading into smaller cylinders. (*Id.*, 84) DuPont sought to discourage reloading in order to prevent contamination of the refrigerant. (*Id.*)

During the period 1969 to 1972 Virginia Chemicals did not sell to any wholesalers on DuPont's behalf other than "ARW-type wholesalers". (*Id.*, 99) "This was the means of distribution for the product, to sell to the wholesaler in the air conditioning and refrigeration field". (*Id.*)

(2) *Harold G. Palmer (By deposition taken January 30, 1974 in Portsmouth, Virginia)*

(a) *Direct Examination*

Harold G. Palmer ("Palmer") was retired on October 1, 1972 from his employment with Virginia Chemicals. Prior to October 1, 1972 he had been an employee of Virginia Chemicals for 29½ years with his final position being Manager of Refrigeration Sales. (Palmer Depo., 120-121)

At pages 122 through 126 of his deposition Palmer testified with respect to several of the documents produced by Virginia Chemicals pursuant to a subpoena duces tecum. These documents were offered by Daiflon at trial and are discussed in Section C-X, *infra.*

Virginia Chemicals did not attempt to solicit business from both wholesalers and contractors. (*Id.*, 126) Rather, company policy "for at least thirty years" was to sell principally to air conditioning, refrigerant and heating wholesalers. (*Id.*)

C-X. *The Virginia Chemicals Exhibits.*

Among the more significant documents obtained from Virginia Chemicals by subpoena duces tecum and introduced by Daiflon at trial were the following:

Pl. Exh. No. 7092: Inter-office correspondence dated October 13, 1971 from V. S. Wulfson, Jr. (Virginia Chemicals — Houston representative) to Ward of Virginia Chemicals, analyzing trade reports received from other employees. At the conclusion of the report Wulfson makes the following comment:

> "With the Daiflon market penetration on the increase, we can expect to see severe continued price competition with this product. The presence of the RIP situation in the southwest along with Daiflon and new variations in price competition threatens to change marketing methods as we presently know them. *** In any event, 1972 will be a crucial year as regards the marketing of this type product."

Pl. Exh. No. 7105: Inter-office correspondence dated April 15, 1970 from Luther Cox to Paul Nelson, subject "Daiflon". Cox states that a Mr. John Davis has signed an exclusive contract with Daiflon to represent them in Virginia, North Carolina and South Carolina. It is reported that Davis "has full control of accounts to whom he will sell Daiflon (even contractors) and the price at which he will sell Daiflon. He once asked, 'Does everyone in North Carolina and South Carolina want to get into the wholesale business?' Mr. Davis, due to his current commitments to the legit wholesalers, he intends to sell these accounts and at the same price as we're selling Freon to our accounts.***"

Pl. Exh. No. 7107: Inter-office correspondence dated

March 26, 1971 from Wulfson to all central region salesman regarding "Daiflon, Inc." In this memorandum Wulfson states that Daiflon "continues to pose a threat to refrigerant sales in our region". He further notes that Daiflon is becoming aggressive and that the Galveston plant is now operational.

Pl. Exh. No. 7116: Inter-office correspondence from Paul A. Nelson to R. M. Glover of DuPont dated April 18, 1970. Nelson advises Glover:

> "Increased concern was noted among wholesalers about the effects on their refrigerant sales of Daiflon's recently accelerated sales activities. Since Daiflon's distribution is not exclusively directed through conventional trade channels, Daiflon could upset the market to an extent far greater than the pounds of refrigerant that would be sold."

Pl. Exh. No. 7122: Inter-office correspondence dated April 16, 1969 from Paul A. Nelson to R. M. Glover of DuPont. With respect to "foreign competition" Nelson states:

> "Wholesalers are naturally concerned about the impact of Daiflon and Friggen. As of now, they are not a serious threat but what probably really worries the wholesalers is that the distributors of these foreign refrigerants may not adhere to traditional U.S. refrigerant distribution policies."

C-XY. *Virginia Chemicals Exhibits Excluded by the Court.*

During the course of trial the district court excluded 27 Virginia Chemicals documents offered as exhibits by Daiflon. Among the more significant exhibits excluded were the following:

Pl. Exh. No. 7071: "Trade Report Refrigeration Department" dated March 10, 1970 with copies to Messrs. Ranson and Glover of DuPont. In this report the Virginia Chemicals representative reports on an interview with the

owner of a DuPont wholesaler in Montgomery, Alabama and states that the wholesaler "told me of the impending danger of the Japanese gas which was being shipped down to his area by Charlie Walters (a Daiflon representative), and again here in Montgomery I got another report of this." The Virginia Chemicals representative indicates that the DuPont customer was quite concerned regarding this development and that it would definitely have an effect on volume before the year is over. He concludes his report by soliciting "suggestions regarding the combatting of this Daiflon gas that has helped jobbers in other areas***."

Pl. Exh. No. 7094: Inter-office correspondence dated July 30, 1971 from V. S. Wulfson, Jr. to Ward. In the final "Comment" Wulfson states:

> "Perpetuation of this domestic refrigerant competitive activity further emphasizes the menace to our distribution in the various marketplaces by foreign-made refrigerants."

D. *The Allied Chemicals Witness*

(1) *Richard Regan (By deposition taken June 1, 1973 in Morristown, New Jersey)*

(a) *Direct Examination*

Richard J. Regan ("Regan"), at the time his deposition was taken, was Director of Marketing for Genetron and Urethane Chemicals, Specialty Chemicals Division, Allied Chemical Corporation. (Regan Depo., 6) He had held that position for 16 months. (*Id.*, 6-7) During the last thirteen years he had been personally familiar with Allied's pricing practices and sales procedures with respect to refrigerant gases. (*Id.*, 7) Refrigerant prices declined commencing in 1969 because of competition and "the maturity of the market". (*Id.*, 11) By "maturity of the market," Regan means that fluorcarbons have gone from a specialty type product to a commodity — commodities being large volume, lower profit items. (*Id.*, 12) The price decline following 1969 is generally attributed to

over-capacity". (*Id.*, 13) Regan did not believe that the introduction of foreign refrigerants has affected the market. (*Id.*, 14) Regan never attended any meetings in which the subject of Daiflon's entry into the market was discussed. (*Id.*, 15)

During the period 1969 through 1972 Allied distributed R-12 and R-22 to the replacement market — "We primarily or really exclusively dealt through refrigeration wholesalers." (*Id.*, 20)

Allied did have some special discount or price adjustment arrangements with wholesalers in order to meet competition and retain Allied's share of the market. (*Id.*, 27) Such a discount or adjustment would only be given if Allied management was given evidence that one of Allied's competitors had offered a discount or rebate to a customer. (*Id.*, 28) Allied offered a 13% discount to its customers for five or six months and the discount was shown on the face of the customer invoice. (*Id.*, 37-39)

Allied's manufacturing facilities are located in New Jersey, Louisiana, Illinois and California, and warehouses are situated in most major cities. (*Id.*, 62-63) Regan is acquainted with O'Donnell and Wright of DuPont and E. Smedley Ward of Pennwalt. (*Id.*, 81-82) During the period 1969 to 1972 Regan attended ARW and ASHRAE meetings at which most of his competitors are represented. (*Id.*, 83-84) He never talks business with his competitors and never had an occasion to discuss imported gas with them. (*Id.*, 85) Nor have distribution policies been discussed. (*Id.*, 86)

Regan estimates that DuPont's share of the replacement market in 1972 would be 40 to 45% with Allied haveing a share of 18 to 20%. Union Carbide would have about 15%, Pennwalt would have about 9 or 10%, Racon would have about 5%, and Kaiser would have about 5 or 10%. (*Id.*, 96-97) The market shares of defendants have not varied to any degree between 1969 and 1972. (*Id.*, 97)

The price decrease in December of 1972, effective January of 1973, was two cents per pound, and each of the manufacturers increased prices to that level. (*Id.*, 102) Union Carbide initiated this price increase. Allied normally waits to see what DuPont and others are going to do with respect to an increase, and if it appears that "it will be effective, we will go along with it". (*Id.*, 102) If DuPont had not raised their prices two cents at that time, Allied would not have gone along with the increase. (*Id.*, 102)

With respect to the price increase of October, 1972, Allied arrived at its price based on the prices published by Union Carbide. (*Id.*, 106) The reason Allied joined in the increase was because of increased costs and the need to recover as much as possible. (*Id.*, 106-107) During the period 1968 through 1972 it was customary that if one of the defendants either raised or lowered prices, the other defendants would follow. If Allied did not initiate a price increase or decrease it would just follow whatever was published by its competitors. (*Id.*, 116) In March of 1972 there was a price decrease of about 15% over the prior published schedule. (*Id.*, 119-120) With respect to the March, 1971 reduction of 13% Regan did not recall whether Allied initiated the decrease, but stated that the purpose was to place the existing rebate arrangements on the face of the invoice. (*Id.*, 122-123)

During the balance of Regan's deposition testimony he identified and testified to several documents produced by Allied, some of which are discussed in Section D-X, *infra.*

D-X. *The Allied Chemical Exhibits.*

Among the more significant documents obtained from Allied Chemicals and introduced by Daiflon at the trial were the following:

Pl. Exh. No. 3000: "Assignment Outline and Report" dated February 17, 1969 from H. C. Hansen, Director of Sales for Allied to A. J. Johnston with re-

spect to Waugh Brothers, an Oklahoma City wholesaler. Hansen indicates that Waugh Brothers is concerned because of the fact that Daiflon's prices "are only a few percentage points higher than wholesale cost". Moreover, [t]hey are also concerned that Daiflon may sell any type wholesale house to get into this market."

Pl. Exh. No. 3013: Inter-office memorandum dated April 7, 1970 from Jerry W. Woyahn, Assistant District Sales Manager for Allied in the Midwestern District to five Allied salesman. Woyahn states that Japanese refrigerant "Daiflon" is "being offered and their much more aggressive approach in '70 is causing real concern". Woyahn then requests that he be provided with every instance where Daiflon is either purchased or sold, and instructs the salesmen to "exhibit real concern" when Allied's customers bring up the subject of Daiflon. The memo concludes as follows:

> "* * * and you will be kept informed as to what steps are being taken to combat this problem."

Copies of the letter were mailed to H. C. Hansen, Director of Sales and A. J. Johnston, Manager of Sales, among others.

Pl. Exh. No. 3016: Memorandum from H. C. Hansen, Director of Sales dated April 16, 1970 to A. H. Baker, Vice President-Marketing, regarding "Japanese Daiflon Refrigerant". This critical memorandum outlines "possible actions" against Daiflon, and is attached in its entirety as Exhibit "E" to this Narrative Statement of the Case.

Pl. Exh. No. 3019: Memorandum from A. J. Johnston, Manager of Sales dated August 6, 1970 to A. H. Baker, Vice President Marketing, with respect to wholesaler performance for the year 1970. The memorandum indicates "below budget performance" which is attributed in part to "imported refrigerant". Johnston notes that Daiflon has been successful in getting business in

Roanoke, Virginia; Birmingham, Alabama; St. Louis, Missouri; Omaha, Nebraska; Kansas City, Kansas; Minneapolis, Minnesota; and Milwaukee, Wisconsin. The reported loss to Allied's wholesalers due to Daiflon's activities is estimated 50 tons of refrigerant gas.

Pl. Exh. Nos. 3042, 3043, and 3045: These memoranda prepared by Allied during the year 1970 relate to requests by companies to act as "Allied wholesalers". In each letter the suggestion is made that a "Dear John" letter be mailed from Morristown declining the request.

Pl. Exh. No. 3103: "Alerting Service, Commercial Information Center" dated September 17, 1971 directed to Mr. H. L. Noble, subject "Imports". This document contains information with respect to shipments of refrigerant from Japan to Daiflon during the time period February 25, 1971 through September 1, 1971. The information includes the date of shipment, identity of the consignee (Daiflon in each instance), country of origin (Kobe, Japan), port of entry (Houston and Galveston), shipment units and weight.

Pl. Exh. No. 3107: Inter-office correspondence from Vincent A. Perla, Sales Representative of Allied to C. J. Knock, Regional Sales Manager, dated May 3, 1971, subject "Daiflon, Inc., Galveston, Texas". In the first paragraph of this memorandum, the writer indicates that: "During the week beginning April 26, 1971, the Houston Sales Office began intensive observation of a Flourocarbon competitor, Daiflon, Inc." What follows is a complete description of Daiflon's activities, its plant, the relation of a conversation with a Daiflon foreman, and a summary of discussions with wholesalers in the Galveston Area.

E. *The Kaiser Witnesses.*

(1) *William A. Sorensen (By deposition taken July 10, 1973 in Oakland, California)*

(A) *Direct Examination*

At the time his deposition was taken, William A. Sorensen ("Sorensen") was National Sales Manager for Kaiser Aluminum & Chemical Sales, Inc. (Sorensen Depo., 4) Kaiser Aluminum & Chemical Sales, Inc. is a division of Kaiser Aluminum & Chemical Corporation and is responsible for sales. (*Id.*, 5) Sorensen is employed by both corporations. (*Id.*) Kaiser manufactures R-11, R-12, and R-22. (*Id.*, 6) Sorensen has been employed by Kaiser for 10½ years. (*Id.*)

When an industry price change is made by a competitor of Kaiser, the change is studied and once Kaiser is convinced that the pricing change is "real" Kaiser changes its price to be competitive in the market. Kaiser confirms to price changes, "we are not price leaders in this market, we are price followers". (*Id.*, 12) Kaiser follows the suggested or published price of the company initiating the change. (*Id.*, 13) It has been the pattern that if DuPont makes a price change Kaiser will follow it, and if DuPont fails to make a change, Kaiser will not act. (*Id.*, 15)

Kaiser attempts to select a distributor that will give it the broadest distribution in the marketplace. Generally the distributor is a full-line air conditioning refrigeration parts supply company (*Id.*, 20)

The 13% "competitive discount" was allowed by Kaiser in 1971 because that was the action undertaken by DuPont. (*Id.*, 91) Also, Allied, Union Carbide, Pennwalt and Racon joined in the 13% reduction. (*Id.*, 92) Kaiser's competitive status reports (CSR's) which document off-list pricing arrangements, are management tools "to help decide whether we want the business". (*Id.*, 93) The legal department of Kaiser emphasizes the need for confirming competitive situations and they refer to the CSR if there is a legal reason to use it. (*Id.*) Kaiser cannot arbitrarily change a price unless there is a CSR to support the price change. (*Id.*, 93-94)

At pages 95 through 156 of the Sorensen deposition,

the witness identifies and testifies with respect to several documents produced by Kaiser pursuant to Daiflon's request. Some of these documents were utilized as exhibits by Daiflon at trial and will be discussed in Sections E-X and E-XY, *infra.*

During the period 1969 through 1972 there was never a shortage of fluorocarbons; all trade indications were that the industry had a tremendous capacity of excess over demand. (*Id.*, 157)

Prices were deteriorating in 1972 and prior years. Kaiser's reduction of prices in March of 1972 was to meet published prices that were announced by competition. (*Id.*, 165) One cannot sell a product at a premium for any length or period of time and "maintain its share of the market". (*Id.*) Kaiser raised its prices in October of 1972 because it was interested in making as much profit as possible; it did not have to raise prices to the level of its competitors; (*Id.*) Kaiser's "independent interpretation" was to make as much money as possible, by raising prices to the maximum level it could in 1972.

(2) *Frank R. Rose (By deposition taken July 11, 1973 in Oakland, California)*

(a) *Direct Examination*

At the time his deposition was taken Frank R. Rose ("Rose") was a resident of Dallas, Texas and for over ten years had been employed by Kaiser Aluminum & Chemical Sale, Inc. (Rose Depo., 4) His position was that of Regional Sales Manager. (*Id.*, 8) During the period 1968 through February, 1972 he was a District Sales Manager for Kaiser and supervised Steve Miller (Kansas City), Jerry Mundy (St. Louis) and Harold Gresham. (*Id.*, 10) Gresham was headquartered in Houston, and prior to that time Mike Sharpe handled the territory. Before Sharpe, Rose handled it and before Rose, Bernard Solon handled the territory. (*Id.*, 11) Solon was relieved of his duties in December of 1971 because he did not want to conform to company poli-

cies. (*Id.*) Kaiser did not feel that Solon was doing the overall sales job that was expected of him. (*Id.*, 12)

Rose received inter-office memoranda relating to Daiflon and foreign gas, and he had some photographs that were forwarded to him of the Daiflon plant in Galveston. (*Id.*, 19) The photographs were attached to an inter-office memorandum which had been transmitted by Gresham. (*Id.*) Rose had requested that Gresham go to Galveston to determine what type of an operation Daiflon had and how big it was going to be. (*Id.*) Rose reported to Sorensen in connection with the Daiflon information received from Gresham. (*Id.*, 34)

The only discussion with respect to Daiflon was in regard to "profitability". Kaiser could not compete at Daiflon's low price level. Kaiser had to rely on marketing services and business relationships with customers to maintain its share of the market. (*Id.*, 36) Kaiser offered a Xerox training program for management and sales personnel of wholesalers. Also it provided advertising and substantial marketing and product literature to wholesalers. (*Id.*) Kaiser further provided an extensive advertising marketing research and financial assistance program to its wholesalers. (*Id.*, 37) Kaiser maintained a trip program by which wholesalers were given trips to various locations depending upon the amount of refrigerant which they purchased. The trip program was designed to establish a closer rapport between Kaiser and its customers and to allow Kaiser representatives to spend periods of time with customers away from their place of business. (*Id.*, 44-47)

The refrigerant gas market is highly competitive and volatile. It is a commodity market. Kaiser's refrigerant is no different from any other refrigerant, including Daiflon, with one exception. (*Id.*, 47) The major producers in packaging their refrigerant transfer the gas only two times whereas the Daiflon operation required possibly four transfers. (*Id.*) He never observed Daiflon's operations, apart

from the photographs which he was furnished. (*Id.*, 48) Rose had no personal knowledge that Daiflon's operation created a greater likelihood that its product would have more moisture than Kaiser's. (*Id.*, 48-49) Rose had no knowledge of the type of equipment used by Daiflon for transferring the gas, nor did he know whether the equipment was any different than Kaiser's. (*Id.*, 51)

To Rose's knowledge Kaiser did not have a problem with wet gas. (*Id.*, 51) However, there might have been one instance where a cylinder was returned to the laboratory on a moisture content which was within industry-wide specifications. (*Id.*, 52) He did not have any of Daiflon's cylinders tested and had no knowledge of whether the cylinders contained more moisture than the industry allowed. (*Id.*, 52)

Following the March, 1971 price reduction Rose conducted an analysis of the difference between Daiflon's and Kaiser's delivered costs on certain products. That analysis was contained in a competitive pricing report prepared by Rose. (*Id.*, 56; Pl. Exh. No. 3512)

At pages 52 through 84 of Rose's deposition he identifies and testifies with respect to several documents produced from the Kaiser's files. Many of these documents are discussed in Sections E-X and E-XY, *infra*.

At the time that Gresham was employed by Kaiser, he was reliable, dependable and honest in all of his dealings with Rose. (*Id.*, 84-85) When Gresham terminated his employment with the company it was terminated on a friendly basis. (*Id.*, 85) Gresham elected to leave Kaiser to go with National Refrigeration Supply in Houston, Texas, which is an account he established for Kaiser. (*Id.*) Rose had helped Gresham during the training process and established some target accounts for him. (*Id.*) Rose and Gresham went over the account list and determined which accounts Gresham should concentrate on and which he should not. (*Id.*, 85-86) Gresham was advised with respect to which

customers he should call on regularly. (*Id.*) He did not tell Gresham that because Kaiser is one of the smaller manufacturers it was only allocated a certain percent of the market insofar as certain customers in his territory were concerned. (*Id.*) Kaiser did not have the capacity to furnish gas to the entire market, and no one supplier could. (*Id.*, 87) Rose told Gresham not to call on "quite a number of accounts". DuPont and Union Carbide were selling to some of these accounts. (*Id.*, 88) When Rose referred to the accounts that DuPont had he did not make the statement to Gresham that Kaiser did not want to "kick the giant in the shins". (*Id.*, 88) However, Rose has heard that expression, and has heard DuPont "reverently referred to" as "Big Daddy" and "Uncle Dupey". (*Id.*, 89)

Kaiser has some 100% accounts such as Alamo Welding Supply, Gibbons Supply and Lone Star Supply. (*Id.*, 90)

Rose did not recall making a statement to Bobby Barnhart and Steve Stevens (representatives of wholesalers) that they "should be careful about buying Jap refrigerant because of the fact that it would probably get or might get water in it". However, Rose acknowledges that he "could have" made the statement. (*Id.*, 116)

E-X. *The Kaiser Exhibits.*

Among the more significant documents obtained from Kaiser and introduced by Daiflon at the trial were the following:

Pl. Exh. No. 3512: A comparision of Daiflon prices vs. the prices of Kaiser distributors. The comparison relates to six products and shows Daiflon's net delivered cost, the cost of the Kaiser distributors and the difference in the two. This exhibit, attached as Exhibit "F" to this Narrative Statement of the case, was prepared by Rose and he testified with respect to it in his deposition testimony. (Rose Depo., 56)

Pl. Exh. No. 3666: Inter-office memorandum dated May 10, 1972 from Steve Miller, Kaiser salesman in Kansas

City to Sorensen with a copy to Rose. This document shows that a Sears bulletin promoting Daiflon refrigerant was attached and Miller indicates that the "approval of Daiflon by a company as large as Sears is a significant step in the Daiflon strategy". (*Id.*)

Pl. Exh. No. 3678: Inter-office memorandum dated September 28, 1971 from E. G. Beebe to Sorensen with respect to "dumping accusations" regarding Daiflon. A copy of this document is attached as Exhibit "G" to this Narrative Statement of the Case.

Pl. Exh. No. 3687: Kaiser Competitive Status Report effective July 1, 1970 with respect to U.S. Electric Company in Springfield, Illinois. This critical document reflects that the competitive adjustment is to be limited only to contractors who have been offered Japanese gas (approved by Sorensen) and is attached as Exhibit "H" to this Narrative Statement of the Case.

Pl. Exh. No. 3733: Inter-office memorandum dated March 9, 1972 from J. M. Lawlor of Kaiser's Houston office to Rose with copies to Sorensen and Beebe, subject "Gas Fight at Houston's OK Corral". Lawlor indicates that deteriorating prices in the Houston territory have become almost an accepted fact and that speculation, in part, attributes the emotional marketing strategy to the "foreign gas influence in the Houston, San Antonio, Austin, Corpus Christi, and Galveston areas." Lawlor concludes the letter by stating:

> "It goes without saying, gentlemen, that this is a pandora's box, and this will not necessarily stay in this territory. We must urgently make decisions as to how we plan to handle this market."

Pl. Exh. No. 3743: Inter-office memorandum dated October 22, 1971 from Frank Rose to Sorensen. Rose reports on the "excellent 'G-2' activity of our super sleuth in Houston, Bernie Solon, and we have been able to obtain invoices from Daiflon, Inc. on their sales to a Houston

CONTRACTOR". Solon notes that President Nixon's "edict has had a reverse effect instead of raising foreign goods prices they have seemed to be lowering them." Solon concludes by stating that he hopes the information provided "will lead to your dossier for legal investigation."

E-XY. *The Excluded Kaiser Exhibits.*

During the course of trial the district court excluded 7 Kaiser documents which were offered as exhibits by Daiflon. Among the more signficant exhibits excluded was the following:

Pl. Exh. No. 3680: Interoffice memorandum dated September 10, 1971 from H. D. Spicer, of Kaiser's Dallas office to Rose and Sorensen, subject "Daiflon". Spicer states that it has come to his attention that Daiflon's cylinders are not labeled "Made in Japan". He indicates that although this alone appears to be unimportant, "I thought that it might constitute a nuisance factor if they were required to label their cylinders 'Made in Japan'." Spicer further states that this has been discussed with Frank Rose, and that Rose suggested that Spicer caller the Department of Commerce which had been done. Spicer further states that he called Mr. Milton Brown, an attorney for the Federal Trade Commission, to get more specific answers with respect to labeling. Brown advised Spicer that he was not sure that the "Made in Japan" label was necessary due to the fact that the Federal Trade Commission Act applied to the labeling of retail goods. Brown asked Spicer whether he thought such labeling would have an affect on Daiflon's sales, and Spicer responded that he did not have concrete evidence in that regard. Spicer said he did not discuss dumping with Brown, but that when Brown returned his call the next week Spicer would ask for the names of specific individuals whom he contacted in Washington. Spicer concludes his memorandum by stating:

> "My action was prompted by the desire to protect the status of our company and our company's customers.

You are all well aware of the situation that is being caused by foreign competition in my territory. I will look forward to receiving your comments and suggestions on what I have done."

F. *The Pennwalt Witness.*

(1) *E. Smedley Ward, Jr. (By deposition taken July 16, 1973 in Philadelphia, Pennsylvania)*

(a) *Direct Examination*

At the time of the taking of his deposition, E. Smedley Ward, Jr. ("Ward") was manager of the Pennwalt department responsible for the marketing of fluorocarbons under the trade name "Isotron". (Ward Depo., 7) Ward had been employed by Pennwalt approximately 16 years. (*Id.*) He was manager of the Isotron division since July, 1968 and as manager was responsible for the marketing of Isotron nationally and the supervision of 35 employees. (*Id.*, 8)

Pennwalt sells to full-line established wholesalers all over the country. (*Id.*, 30) Pennwalt has never attempted to obtain business by giving better prices to wholesalers and this was true for the 1968 to 1972 period. (*Id.*, 31-32) Pennwalt has never initiated any price reductions during the period 1968 to 1972, nor has it initiated any discounts or rebates. (*Id.*, 32) However, Pennwalt has offered legitimate cost savings for rail car deliveries. (*Id.*) When asked whether his competitors acquired business by giving discounts or reducing prices to particular wholesalers, Ward responded: "Well, everybody claims that they are meeting a competitive situation." (*Id.*, 34) Ward said that he believed that to be true. (*Id.*)

One of Pennwalt's wholesalers, Solar Supply, has a note with Pennwalt, and Ward expected Solar to give Pennwalt more business than it in fact did because of that financial arrangement. (*Id.*, 38) Pennwalt gave Solar a loan initially to help them get started. (*Id.*, 39) The current amount of the note is $50,000.00 and calls for payment of

interest at 10% per annum. However, Pennwalt has waived the interest payments. (*Id.*, 39-40) Pennwalt has other customers that it has the same kind of arrangements with. (*Id.*, 41) In 1970 or 1971 Flick Supply of New Orleans was given a loan for approximately $90,000.00 so that Pennwalt could become a supplier. (*Id.*, 46-47) The loan was not given to meet a competitive situation but rather to gain new business in that area for Pennwalt. (*Id.*, 47-48) The note arrangement is a marketing technique (rebating interest) which Pennwalt was utilizing to be competitive throughout the country. (*Id.*, 49) All of the other manufacturers used this "arrangement". (*Id.*)

Pennwalt did not initiate any list price changes, rather Pennwalt followed changes which were made by its competitors. (*Id.*, 83) Normally, either Ward learned of the changes by reading the *Wall Street Journal* or *Journal of Commerce*, or somebody brought a price change to his attention, and Ward would report it to his boss. Thereafter, he would check the accuracy of the change and if accurate he would obtain permission to make the change for Pennwalt. (*Id.*, 83-84) Ward never recommended that Pennwalt independently raise or lower prices and his only recommendation was: "Let's don't be the first one to follow the announcement." (*Id.*, 84) Pennwalt did not key its price moves to any particular manufacturer. (*Id.*, 85) When a price increase was announced, Pennwalt followed because its earnings had not been satisfactory. (*Id.*, 86) Additional volume is not picked up by price in this industry. (*Id.*, 86-87) DuPont historically was the company to take the lead in price increases; however, if one of Pennwalt's competitors did not initiate a price increase in the fall of 1972 Pennwalt would have done so. (*Id.*, 87)

Price deterioration accelerated during the past three to four years. (*Id.*, 90) Price concessions in the form of discounts have been present since Pennwalt's entry into the market, but they have not been as severe as they have

been in the last three to four years. (*Id.*, 91) Price erosion is attributable to the fact that there is an oversupply of fluorocarbons in the industry. This commenced with the entry of Union Carbide in 1958 or 1959. (*Id.*, 91) The entry of Racon later added to the oversupply. (*Id.*, 91-92)

The emergence of Daiflon into the refrigerant market did not have any effect on Pennwalt during the period 1968 to 1972. (*Id.*, 93) Ward learned of Daiflon from trade journals and customers. (*Id.*, 94) Pennwalt had only two competitive situations with Daiflon and those involved Solar Supply and Waugh Brothers. (*Id.*) Solar had indicated to a Pennwalt salesman that a new refrigerant was being marketed in Solar's part of the country and that the pricing was "hurting the market down there". (*Id.*, 94-95) Daiflon's pricing was to contractors and servicemen. (*Id.*, 95) Daiflon did not offer any competition to Pennwalt with respect to the Solar Supply situation and Ward refused to meet any competitive situation at Solar. (*Id.*, 97)

During the period 1969 through 1972 Pennwalt did not sell to wholesalers other than "ARW-type" wholesalers. (*Id.*, 99) This means of distribution and pattern of policy was set up by DuPont. (*Id.*)

Ward did not keep a file on Daiflon because he did not have much to put in it. (*Id.*, 102-103) He testified to receiving a Daiflon price sheet, but "probably tossed it away. I don't know where it is." (*Id.*, 103) During 1968 to 1972 Ward attended trade meetings particularly ARI and ARW. (*Id.*, 104) Pennwalt's competitors attended these meetings but there was never any mention of the entry of foreign gas into the market. (*Id.*, 105) There was a general awareness that Daiflon was trying to sell in this country but that was the extent of it. (*Id.*, 106) There was no discussion regarding Daiflon in the meetings "*per se*"; however, there may have been some discussion between people who were gathering more or less on a social basis. (*Id.*, 106) The substance (if in fact anything was said) was that

there was another competitor who would be marketing refrigerant gas to a wholesaler. (*Id.*, 106) There was no discussion with respect to unusual practices of Daiflon. (*Id.*, 107) There were no comments about Daiflon's products. (*Id.*) The only discussion which may have occurred with wholesalers with respect to price erosion was that a wholesaler might say "when are you guys going to get smart and stabilize the price?" (*Id.*, 108) At no time did Ward hear any discussion at the ARW meetings of Daiflon's market practices. (*Id.*, 109)

None of the domestic manufacturers sell refrigerant directly to servicemen and/or contractors. This has been an industry practice since Pennwalt has been in the market which has been for 15 years. (*Id.*, 118-119)

During the period 1969 to 1972 Pennwalt's share of the market for R-12 and R-22 has been about 8 to 9%. (*Id.*, 124) Allied's share is about 35%, DuPont has pretty close to 45%, Union Carbide has about 10% and the balance would be spread between Kaiser and Racon. (*Id.*, 125) The relative market shares have not changed significantly during the past five years. (*Id.*, 126) The refrigerant market is about a $70+ million dollar market and has increased during the past years. The market has increased about two to three million dollars per year. (*Id.*, 127)

Following the increase in prices in the fall of 1972 there have been considerable competitive discounts that have taken place. (*Id.*, 142)

Ward does not see a relationship in this market between price and volume. (*Id.*, 156-157) Ward testified with respect to several Pennwalt documents at pages 198 to 210 and 214 to 215 of his deposition testimony. Some of these documents will be discussed in Section F-X, *infra*.

(b) *Cross Examination*

Pennwalt has not done anything either individually or in agreement with any other manufacturer intended to reduce the sales of Daiflon or its market penetration or to

destroy the company. (*Id.*, 265) Pennwalt has not taken Daiflon's existence into account in the marketing of its products. (*Id.*) Any reference to foreign gas in Pennwalt's marketing plans "was introduced into the text just to enliven the reading for the person who is doing the reading of the plans." (*Id.*, 266) The sales department puts a lot of hot air into the plans; they are made once a year and not looked at again until they are prepared the next year. (*Id.*, 266-267)

Pennwalt believes that the wholesaler route is the best way to reach the replacement market. (*Id.*, 271)

F-X. *The Pennwalt Exhibits.*

Among the more significant documents obtained from Pennwalt and introduced by Daiflon at the trial were the following:

Pl. Exh. No. 4031: Inter-office memorandum dated January 8, 1970 from Ward to W. W. Morgan requesting that letters be prepared to each of Pennwalt's markets announcing the recent price increase and enclosing a copy of DuPont's letters for Morgan's guidance.

Pl. Exh. No. 4042: Inter-office memorandum dated August 27, 1970 from R. P. Howard to Ward listing the current note arrangements in effect for the wholesale market. Sixteen wholesalers are identified in the body of the letter with details in connection with the notes of each.

Pl. Exh. No. 4134: Inter-office memorandum dated March 31, 1969 from R. P. Howard to Ward, subject "Wholesale Market — Lennox and I-22 Price Reduction". Howard states as follows:

> "Don Miller of DuPont recently told you that the price cut was a result of situations like Lennox. Therefore, it is safe to assume that all competition will point their finger at Isotron for aiding and abetting the Lennox situation when all of our no deposit cylinders are made by Lennox. This will especially be the case at accounts where Isotron is a major supplier."

F-XY. *Excluded Pennwalt Exhibits.*

During the course of trial the district court excluded 5 Pennwalt exhibits which were offered as exhibits by Daiflon.

G. *The Union Carbide Witness.*

(1) *Donald J. Napoli (By deposition taken June 13 and 15, 1973 in New York, New York)*

(a) *Direct Examination*

Donald J. Napoli ("Napoli"), at the time his deposition was taken, was Marketing Manager for Union Carbide Refrigerants, Solvents, Cosmetics, Detergent Intermediates and Supporting Industries. (Napoli Depo., 5) He had been Marketing Manager for Refrigerants for approximately two years. (*Id.*, 6) R-22 has a different vapor pressure than R-12. Also, these grades of gas have different heat transfer properties. (*Id.*, 12) R-12, being a lower pressure product, has a lower heat transfer efficiency, and is used in heavy equipment, such as large refrigeration units and industrial air conditioning. (*Id.*, 13) R-22 is used for more compact refrigeration systems, such as display cases and small room air conditioners. (*Id.*) R-502 is more efficient than R-22; it has a higher pressure and a better heat transfer coefficient. (*Id.*)

The market for R-12 and R-22 is divided into two segments: (1) the replacement market, which is all refrigerant gas used for maintenance, and replacement of units that are being serviced; and (2) original equipment market, which is refrigerant utilized in new equipment that is being manufactured. The end user of replacement refrigerant is the contractor, and between Union Carbide and the contractor there are wholesalers of various types. (*Id.*, 15) The typical wholesaler that purchasers from Union Carbide is an individual involved in the air conditioning, refrigeration industry who stocks other items that are sold in the market such as compressors, copper tubing and packaged units. The wholesaler is oriented to the air conditioning market. (*Id.*, 16)

The wholesalers resell the gas to contractors, and repackers sell to whoever will buy from them, including contractors. (*Id.*, 25) This pattern of distribution has been utilized by Union Carbide for the entire period of time (four years) that Napoli has been employed by the company. His immediate predecessor was J. W. Gordon. (*Id.*, 26) Gordon is still with the company. (*Id.*)

Union Carbide did not maintain a separate file on Daiflon, and every item that was received with respect to Daiflon was placed in a general file, in whatever way the secretary desired to file it. (*Id.*, 41) However, Union Carbide did keep one on Daikin, because they were a large manufacturer of refrigerant gas. (*Id.*)

Refrigerant prices were decreased in March of 1972 because of "competitive action". (*Id.*, 56) This means that individual competitive prices were being met in the industry, and Allied Chemical announced to the industry a new price schedule which appeared to reflect the type of competitive pricing which had prevailed in the marketplace. (*Id.*) Thomas Carmody at Union Carbide was the man who made the final decision with respect to price increases or decreases during the 1969 to 1972 period. (*Id.*, 56-57) Union Carbide determined to reduce prices by 13% in March of 1971 because customers showed Carbide's salesmen letters mailed by DuPont informing the customers of a new price schedule. The Carbide sales department then recommended that if Carbide was going to be competitive and stay in business, it should price the products at the level established by DuPont. Carmody agreed.[6] (*Id.*, 58-59)

Napoli first learned about Daiflon in 1970 when Carbide was canvassing foreign fluorocarbon producers as

---

[6]In Pl. Exh. No. 1042, a DuPont "CONFIDENTIAL" Monthly Report for March, 1971, it is reported: "No word on Pennwalt as to their reaction to our discount arrangement. Allied will meet us, as well as Racon. Carbide has offered a 10% rebate on the invoice with 3% 30-day terms."

potential sources of supply. (*Id.*, 61) In either late 1969 or early 1970 Napoli attended a meeting at which Daiflon was discussed. (*Id.*) Present at that meeting in addition to Napoli were Kenneth Baker, Purchasing Agent, J. W. Gordon, and Mr. Callaghan. At that meeting the parties discussed what Carbide should do in terms of approaching foreign producers with respect to the purchase of fluorocarbon products. (*Id.*, 62) Napoli did not know that Daiflon was a distributor of Daikin products at that time. (*Id.*, 62-63) Carbide determined that it would not be interested in obtaining a source of supply from Japan. (*Id.*, 63)

In 1971 Napoli participated in a meeting with F. T. Schuhlein, J. W. Gordon, T. W. Carmody, and possibly K. J. Gutshaw in which Daiflon, Inc. was discussed. (*Id.*) An assistant sales manager, using data from the Tariff Commission advised those present at the meeting with respect to the imports of foreign fluorocarbons and they attempted to determine whether Daiflon was of any significance to Carbide's business. They concluded, because of its "small size relative to the total market", that it would not be. Napoli understood that the market was 250,000,000 pounds a year and Daiflon had less than 1,000,000 pounds in 1971. (*Id.*)

Napoli identified Pl. Exh. No. 4506 (Exhibit "I" to this Narrative Statement) in which Gordon stated in an inter-office memorandum dated March 15, 1971:

> "The problem here as I see it is not the dollars involved, but the fact that the importers could completely disrupt our distribution pattern which has taken years to develop. The dollars involved are less than 1% of the total U.S. market of more than $250,000,000.00 a year."

The distribution pattern which Gordon referred to was the method Carbide used in selling refrigerant to contractors through wholesalers and repackers. (*Id.*, 67-68) Napoli believes that Gordon's feeling was that Daiflon was sell-

ing directly to contractors and that this was a different type of distribution. (*Id.*, 68)

Japanese gas is not different than the gas produced by Carbide. (*Id.*, 69) Daiflon had an unusual way of handling their gas from an economic standpoint. (*Id.*) Daiflon brought the gas to the United States in large ton cylinders and then transferred to bulk tanks and then into smaller cylinders which did not "sound very economical". (*Id.*)

Napoli received an oral report on Daiflon's operation from Quinn Harmon who is a Carbide salesman in Texas. (*Id.*, 70) Daiflon's method of repacking differed from the repackers to which Carbide sold in that Carbide's repackers purchased the material out of a bulk tank car in 100,000 and 300,000-lb. quantities. Carbide also sold their repackers ton quantities of gas and the method of repackaging was no different from Daiflon's (*Id.*, 70)

The disposable cylinders represented a trade-off between function and economy, and the sellers of the containers "leaned more in the direction of economy, and we had to learn by experience what would work and what wouldn't work". (*Id.*, 72) During the period 1969 through 1972 Carbide had a problem with leaking disposable cylinders. (*Id.*, 74) Another problem was the possibility of people refilling cylinders. No direct sales to contractors were made during the period 1969 to 1972. (*Id.*)

Gordon discussed with Napoli the competitive situation in the refrigerant gas market as it existed prior to 1969. (*Id.*, 122) Gordon advised that it had been a very volatile market with a lot of price cutting and price activity. (*Id.*, 123) In 1972 Carbide had approximately 12% to 14% of the market which could have been as much as 1% lower than its market share for 1969, 1970 and 1971. (*Id.*, 125) During those same years DuPont had approximately 45%, Allied Chemical 22%, Racon 5% to 6%, Kaiser 7% to 8%, and Pennwalt about 10%. (*Id.*, 125-126) There has been a general shift in market shares of plus or minus 2%

through the interaction of the marketplace. (*Id.*, 126)

Carbide maintains approximately 15 warehouse locations throughout the country from which sales are made. Also, shipments are made directly from Carbide's manufacturing facility to its wholesalers. (*Id.*, 131)

Carbide has had complaints of "wet gas". (*Id.*, 139) This is a problem that a manufacturer of refrigerant gas experiences. (*Id.*) However, Napoli does not know whether any of the manufacturers, or Daiflon, have had any unusual experience with respect to wet gas. (*Id.*, 139-140) Carbide has also had problems with cylinders rusting on the outside, although that has not been an unusual problem. (*Id.*, 140) It is possible that Carbide has had complaints with respect to internal rust on cylinders. (*Id.*)

During the last two years Napoli and Ray Berta have attended trade association meetings which were also attended by representatives of the other manufacturers. Martone and Wright from DuPont and Smedley Ward from Pennwalt have also attended these meetings. (*Id.*, 144-147)

Carbide initiated the price increase of December, 1972. (*Id.*, 147) The decision to increase prices was made in August of 1972 and was the result of the judgment of Carbide's business team. (*Id.*, 148) In the August meeting it was determined that Carbide would increase the price in October, and depending upon what reaction existed in the marketplace further action would be taken at the end of the year. (*Id.*, 148-149) The October, 1972 price increase generally reinstated the prices that existed in March of 1971 before the 13% reduction. (*Id.*, 148-149) The December, 1972 increase was approximately two cents a pound across the board. (*Id.*) In October, 1972 there was a "one class price structure — the customer paid one price regardless of the size of the shipment." Accordingly, other producers in the industry between October and December began to give discounts. (*Id.*, 149) The price as stated in

October was not supported by the market. (*Id.*) Therefore, prices were raised again in December, 1972. During the October-December period Carbide lost some business. (*Id.*, 150)

The December, 1972 price increase was met "on the surface" by Carbide's competitors. (*Id.*, 153) The other manufacturers announced that they would increase their prices, and Carbide is still attempting to determine if they did in fact do so. (*Id.*, 153-154)

Carbide does not follow up on the price for which wholesalers sell gas. (*Id.*, 161) Napoli has not had any discussion or attended any meeting in which there was a discussion with respect to prices being charged by wholesalers for R-12 and R-22. (*Id.*, 161)

Napoli met Regan of Allied Chemical at a convention in New Orleans in January of 1972. (*Id.*, 162-163) Napoli first met Wright of DuPont in October, 1972 at an ARW convention. (*Id.*, 164) Napoli first met Ward of Pennwalt at an ARW convention at Lake Tahoe, California in November, 1971. (*Id.*, 165) There was never any discussion of Japanese gas. (*Id.*) Generally, the meetings were social, and there was a discussion of ecology and other general matters. The committee talked about a lot of trivia for the most part. (*Id.*, 166)

At the meeting where the decision was made to raise refrigerant prices in October, 1972 there was discussion of cost increases "based on a total business". (*Id.*, 190) It was determined to raise prices to the general levels of March, 1971. (*Id.*) Prices were established at that level because of government regulations with respect to price increases. (*Id.*, 191) Carbide attempted to establish the price so that it would comply with government controls, and the new price did not necessarily cover the increased costs. (*Id.*, 191-192) In late November, 1972 Carbide decided to raise prices again in December. This was done after evaluating information received from the market

with respect to the prices being charged by competition. (*Id.*, 193)

Carbide found it necessary to change its October, 1972 prices because competition announced price decreases (discounts) and Carbide found itself in a position where it would lose all of its business as a result of "feedback we got from our customers, saying they would no longer buy from us." However, Napoli could not name a single customer from whom such "feedback" was received. (*Id.*, 196-197)

Following the October, 1972 price increase it appeared that the market would not tolerate a one-level price, a "truckload discount price". (*Id.*, 198) Accordingly, Carbide's strategy was to attempt to set a price that would be the same price as the one announced in October, but stated in a different way. (*Id.*, 198)

When Carbide raised prices again in December, 1972 it did what it believed had to be done and hoped that competition would follow. (*Id.*, 200) The price that had been announced in October was "non-competitive". If Carbide left the price as it was in October, it would have been non-competitive and lost business.

In economic theory, as supported by experience, the refrigerant gas industry is commonly referred to as an "oligopolistic industry". (*Id.*, 202) Where there are half a dozen producers producing essentially the same product, if one producer drops the price he only gets a temporary share of the market because the other producers will normally immediately react and lower their price and the market stabilizes at a lower price level with no significant changes in the amount of business. (*Id.*)

On the occasions that Carbide raised its price to meet that of its competitors, its objective has been to recoup the increasing costs of doing business and to improve profitability. Carbide looks forward to any opportunity to raise prices. (*Id.*, 203) The price changes between 1969 and 1972

did not relate to the costs of operation, but rather "for the most part, they were following competition." (*Id.*) Carbide's costs during the period of 1960 through 1972 were continuously increasing and did not justify price decreases during that period of time "in the aggregate." (*Id.*, 204)

Penn Engineering is an "operation arm" of DuPont. It performs the function for DuPont of packaging and distributing refrigerant gas. (*Id.*, 208)

There is a certain type of refrigerant dealer which Napoli characterizes as a "legitimate-type wholesaler". (*Id.*, 215) During the period 1969 to 1972 Carbide did not make any change in policy with respect to its refusal to sell wholesalers that did not fit their judgment as to what a wholesaler should be. (*Id.*, 215-216)

Carbide's competitors made negative comments with respect to Carbide's service and capabilities in the marketplace. (*Id.*, 218) If Carbide were to make a mistake of any type, its competitors would capitalize on it and expand it beyond its actual magnitude. (*Id.*) Daiflon was not guilty of this. (*Id.*)

(b) *Cross Examination*

Napoli's understanding with respect to the relationship between DuPont and Penn Engineering is not based upon anything said by an officer or employee of DuPont. (*Id.*, 219) His understanding is based on reports that were made to him by people in Carbide's sales management over the past four years. (*Id.*, 220)

Napoli has not had any occasion, during the ARI trade association meetings, to discuss with any representative of another manufacturer the question of Japanese gas. (*Id.*, 222)

G-X. *The Union Carbide Exhibits.*

Daiflon introduced during the course of trial several exhibits which had been produced from the business records of Union Carbide. Among the more significant exhibits were the following:

Pl. Exh. No. 4506: Inter-office memorandum dated March 15, 1971 from Gordon to Napoli and others. This memorandum was discussed by Napoli in his deposition testimony, *supra.* (Napoli, 67-68), and is further attached as Exhibit "I" to this Narrative Statement of the Case.

Pl. Exh. No. 4512: Inter-office memorandum dated February 2, 1972 from Quinn Harmon to Ray Berta with a copy to Napoli regarding "Daiflon". Attached is a Daiflon price schedule. Harmon states that the "Galveston operation caused quite a stir late last year. Allied and Racon put Thermal and Westbrook (wholesalers) into a competitive position here and Daiflon quit publishing these prices. ***"

Pl. Exh. no. 4513: Internal correspondence dated March 23, 1972 from Quinn Harmon to Ray Berta with a copy to Napoli indicating that Daiflon is still "stirring up the marketplace *** they are in the process of promoting sales in Louisiana and Mississippi with some real success, and the wholesalers, particularly in Mississippi where the 51M deal hasn't appeared yet, are extremely concerned".

Pl. Exh. No. 4521: Internal correspondence dated March 11, 1971 from R. J. Berta to R. C. Thies with a copy to Napoli, subject "Replacement Refrigerants". In that memorandum the writer indicates that toward the end of the 1970 season, "DuPont apparently felt that they had not received enough of the available replacement market and began a policy of meeting competition at all their accounts."

Pl. Exh. No. 4526: "First Quarter Summary Report" prepared March 31, 1971. At page 2 first quarter sales of R-12 in the replacement market are shown as follows:

	1971 Sales	1970 Sales
R-12	406,948 lbs.	279,524 lbs.
R-22	196,070 lbs.	185,660 lbs.

The "total dollars" for first quarter 1971 sales to the replacement market (all products) was $352,410.00. For the

first quarter of 1970 the "total dollars" were $277,145.00.

Pl. Exh. No. 4552: Internal correspondence dated April 28, 1971 from R. P. Lavach to Napoli, Gordon and others, subject "Fluorocarbon Markets". Lavach reports that he recently visited Allied Chemicals and had a discussion with H. L. Noble, Product Manager — Genetron, and J. R. Conroy, Market Research Department. Lavach was advised that Allied is not having a good year, particularly in refrigerants, and the outlook for 1971 was not optomistic. Noble advised Lavach that the "'Japanese' material being sold in the south and the west was very possibly coming from a U.S. source rather than it being imported. He had no idea who." Noble further stated to Lavach that he did not believe that "there had been or is any significant shift in distribution patterns, that is any move toward a proliferation of small independent resellers."

Pl. Exh. No. 4554: Internal correspondence dated March 5, 1971 from Schuhlein to Theis with copies to Gordon and others, subject "Imported Fluorocarbons — U.S. Wholesalers". Schuhlein indicates that he has studied "completed data on imported fluorocarbons" for the year 1970. He then indicates that the Japanese have put into operation bulk tanks for R-12 and R-22 in Galveston, and that they were obtained a "foothold in the southern market." He reports that as a result Allied should feel increasing price pressures from its wholesalers.

Pl. Exh. No. 4556: Memorandum dated February 4, 1971 from Schuhlein to Thies with respect to "Fluorocarbon Imports". Schuhlein reports on import data for the period July to November, 1970 and recommends that Carbide management be alerted "to search out whether the Japanese cylinders have a DOT approval and to gauge the importers' next moves." He further indicates that: "Longer term we will have to include the impact of foreign material in our plans designed to combat the effect of regional fillers."

Pl. Exh. No. 4557: Internal correspondence dated February 9, 1971 from Schuhlein to Thies, the subject being Schuhlein's memo of February 4, 1971 (Pl. Exh. No. 4556). Schuhlein indicates that he has received additional input with respect to the competitive activities of the Japanese in the south. Schuhlein states that the Japanese are now filling smaller cylinders for distribution through three wholesalers in the south and that Quinn Harmon has been requested to determine whether the cylinders are approved by the Department of Transportation. He concludes with the following observation:

> "Whether they are or not, whoever, this further move by foreign gas must be considered for its future impact on pricing and the possible movement of wholesaler/fillers into the traditional distribution chain."

Pl. Exh. No. 4558: "June, 1971 Report" prepared by J. K. Worthington of Union Carbide for distribution to D. F. Swartz with a copy to Napoli among others. Worthington indicates that Carbide has had numerous complaints, particularly in the southeastern United States, with respect to disposable cylinders that were shut so tightly that customers were unable to open the valves. Also, in Augusta, Georgia a Carbide cylinder exploded and seriously injured a man.

Pl. Exh. No. 4559: "August, 1971 Report" prepared by J. K. Worthington for distribution to D. F. Swartz, with a copy to Napoli and others. Worthington notes in the report that Daiflon is selling a refrigerant "in any size containers to distributors as low as $0.35 per pound on R-12 and $0.57 per pound on R-22". He attaches a Daiflon price sheet to the report. Additionally, Worthington notes several customer complaints with respect to Carbide cylinders and concludes that: "Our Plan is being laxed in their Quality Control."

Pl. Exh. No. 4577: Internal correspondence dated May 8, 1970 from J. A. Rogers to J. Montrose with a copy

to Worthington and Berta, subject "File — Daiflon". Rogers states that the was able to secure a Daiflon price sheet and that the prices were "striking both in the freight/quantity structure and in the most competitive pricing."

Pl. Exh. No. 4585: Internal correspondence dated September 7, 1971 from Montrose to Berta with a copy to Napoli, Worthington and others. Attached to the memo is a copy of Kaiser's price sheet which is to go into effect September 15, 1971 rather than September 1, 1971. The Kaiser price sheet is included as Pl. Exh. No. 4586.

G-XY. *The Excluded Union Carbide Exhibits.*

During the course of trial the district court excluded 2 Union Carbide documents which were offered as exhibits by Daiflon. One of the excluded exhibits was the following:

Pl. Exh. No. 4593: "Confidential Inter-Company Letter" from Bill Hall to J. K. Worthington, subject "Japanese Refrigerants". This is an undated handwritten three-page letter. Hall advises Worthington that Japanese gas, selling under the trade name of "Daiflon" has made some inroads into the market in Hall's territory. He states that it first appeared in Kansas City and more recently in Omaha and Iowa. Hall indicates that on occasion a wholesaler will ask if Carbide "can't do something to combat this troublesome situation ***." Hall states that he has been told that Natkin (a large contractor) has been buying "Jap gas". Moreover, he had been asked if there was anything that "the manufacturers could do to help solve this problem, and I told him that as far as I knew there wasn't, but that I would consult with you and Jack to see if you had any ideas." He then states that:

> "John suggested that we fill some of the old FJ and FH-type cylinders and sell them at a reduced rate to wholesalers who would in turn sell them at a price competitive with the Japanese gas only to those customers who have been won away by the foreigners."

Hall indicates that he did not think that this would be a good idea. Hall concludes the letter:

"Although Daiflon is not yet real big around here, it could get that way. They seem to be concentrating on the larger contractors and it is Searcy's expressed fear that they might eventually get all such business leaving only the small purchasers for the wholesalers. Let me know what you think of this situation.

Regards,

/s/

Bill Hall

P.S. I didn't want this typed because I only wanted you to know. You can take it up with whomever you feel should know about it."

H. *The Racon Witness.*

(1) *Maurice J. Knopf (By deposition taken July 20, 1973 in Wichita, Kansas)*

(a) *Direct Examination*

At the time of the taking of his deposition Maurice Knopf ("Knopf") was President and Chief Executive Officer of Racon, and had been employed by Racon since May, 1969. (Knopf Depo., 4, 14) During the period 1969 to 1972 one of the people with the primary responsibility for marketing was James Maurer, who was Director of Marketing. (*Id.*, 19) He was followed by Harold McSpadden. (*Id.*) Following McSpadden was Corky Knock, who is currently Director of Marketing. Knock was a former employee of Allied Chemical. (*Id.*, 20)

Racon's product is manufactured in Wichita. (*Id.*, 30) When Knopf came to work with the company Racon had a plant capacity of 15,000,000 pounds, but expanded by an additional 5,000,000 pounds in October, 1972. (*Id.*, 30-31) During that period since Knopf has been president of Racon the plant has not operated at full capacity. It has been operating only to the extent that Racon has had sales for its product. (*Id.*, 31) Prior to the October, 1972 expansion Racon was "not quite" operating at full capacity. (*Id.*) The same situation existed in 1971. (*Id.*, 32) At the time of

the taking of Knopf, deposition, the Racon plant was not operating at capacity.

Racon markets its refrigerant gas through wholesalers, and Knopf defines a wholesaler as "someone who serves the refrigerant market." Racon does not sell direct to contractors as a general practice. (*Id.*, 41) He believes that Racon is better served by selling through a wholesaler because it is able to use the wholesaler's market. The wholesaler does the selling and the collecting (*Id.*, 41)

Racon published price sheets during the period 1969 through 1972 and deviated from those published prices only to meet competition. (*Id.*, 46) Each deviation from published prices was made with Knopf's personal approval. (*Id.*, 47)

Knopf became aware of Daiflon in 1970. When asked whether he caused any of his employees to make a special report on Daiflon he testified: "You bet." He asked the Director of Marketing to make sure that everyone who was selling for Racon was cognizant of Daiflon's existence and to observe what Daiflon was doing. Daiflon was never much of a marketing factor to Racon. (*Id.*, 52) Knopf did not know of any difference between the product sold by Daiflon and that manufactured by the defendants. (*Id.*, 53)

During 1969 to 1972 Racon had warehouses in Wichita, Los Angeles, Chicago, Atlanta, and Dallas. (*Id.*, 80-82)

When Knopf became president, Racon had about 2% of the market. (*Id.*, 95) In 1972 Racon presented somewhere between 5 and 6% of the market. (*Id.*) He estimates that DuPont has between 40 and 50% of the market, Allied has 20 to 30% of the market, and Kaiser and Pennwalt each have approximately 5 to 6%. (*Id.*, 97) Racon has probably picked up its market penetration from each of the other defendants. (*Id.*, 98)

During the time that Knopf has been president Racon has never initiated a price change in the industry. (*Id.*, 206)

Racon's decision to increase its plant capacity by

5,000,000 pounds in 1972 is attributable to an exceptionally good sales growth and the fact that its product mix was out of balance. (*Id.*, 113) Racon had the capacity to produce more R-11 and R-12 than R-22, but it sales curve on R-22 had been increasing and it was necessary to increase its R-22 capacity to have the end product mix more consistent with sales expectations. (*Id.*, 114) The increase in R-22 sales have resulted from industry growth and additional customers. (*Id.*, 114)

Racon has never attempted to acquire any business by offering a wholesaler a lower price than the price offered by any of its competitors. This is true for the period 1969 to 1972. (*Id.*, 119)

Knopf recalled having seen photographs of the Daiflon plant in 1971. (*Id.*, 156-157) He received a memorandum from James Maurer (Director of Marketing) regarding Daiflon's plant and operation. (Pl. Exh. No. 5036) Knopf's response to Maurer was: "It's a nice memorandum." That is the only conversation he can recall with respect to the memorandum. (*Id.*, 157)

H-X. *The Racon Exhibits.*

In the course of trial Daiflon introduced into evidence several documents produced by Racon from their business records during pre-trial proceedings. Among those documents were the following:

Pl. Exh. Nos. 5000-5005: Form letters (Dear Johns) prepared by the sales manager of Racon during 1969 to companies that had requested to be distributors of Racon refrigerant gas. In each instance the request is denied for the reason that Racon was receiving "fair marketing through authorized refrigerant and air conditioning wholesalers".

Pl. Exh. No. 5027: Inter-office memorandum dated February 18, 1971 from R. D. Snyder in Racon's Houston Office to Maurer, subject "Daiflon, Inc. — Galveston, Texas", with copies to Knopf and McSpadden. This is the

memorandum which Knopf testified to in his deposition testimony (Knopf, 157), and it is attached as Exhibit "J' to this Narrative Statement of the Case.

Pl. Exh. No. 5036: Memorandum dated July 27, 1970 from Maurer to Knopf regarding "Daiflon, Inc.". Maurer encloses a copy of an article from a Houston paper regarding Daiflon and indicates that the article confirms the rumor which Racon had previously heard with respect to the entry of the Japanese into "our cylinder market". He then asked: "Do we have any avenues open with Daiflon which haven't already been explored?"

Pl. Exh. No. 5164: Memorandum dated March 25, 1969 from L. John Polite, Jr. to Maurer, in which Polite asks Maurer what effect the recent price reduction on R-22 will have on "Japanese imports".

Pl. Exh. No. 5165: Maurer's response to Polite's memorandum of March 25, 1969. In this memorandum, dated March 28, 1969, Maurer states in the final paragraph: "I doubt if the 6½% will hurt the Japanese import margin enough to slow them down."

H-XY. *The Excluded Racon Exhibits.*

During the course of the trial the district court excluded one Racon document which was offered as an exhibit by Daiflon.

I. *Testimony of Former Employees of Defendants.*

(1) *Harold Gresham (by deposition taken May 29, 1973 in Houston, Texas)*

(a) *Direct Examination*

At the time of the taking of his deposition, Harold Gresham ("Gresham") was in the air conditioning and contracting business in Houston, Texas. (Gresham Depo., 4) He had worked for Eastex Air, Inc. for approximately 18 months, and was involved in new construction, air conditioning in homes, and repair service. (*Id.*, 5) Gresham was employed by Kaiser from July, 1969 until August, 1970 and was supervised by Frank Rose. (*Id.*, 7-9) When em-

ployed by Kaiser Gresham went to work in Houston and was there for approximately one week working with Mike Sharpe who was the salesman he replaced. After that he went to Dallas and was there for one week with Rose. (*Id.*)

The principal wholesale customers to whom Gresham was to sell included Standard Brass, Merfish Plumbing & Supply, and Barnhart Refrigeration. Barnhart is in San Antonio, Merfish is in Houston, and Standard Brass is in Port Arthur. Those were Gresham's three major accounts. (*Id.*, 10) Standard Brass had several locations: Port Arthur, Texas, two or three in Louisiana, one in Houston, and one in Beaumont, Texas, together with others.

Mike Sharpe, Gresham's predecessor, indicated to Gresham that the Port Arthur store of Standard Brass is where Kaiser got its business, and that he was only to make courtesy calls on the other stores. (*Id.*, 13) It was Gresham's understanding, from talking to Sharpe, that the Port Arthur store was Kaiser's "allotment", and that it represented the "sharing of business we were to receive." (*Id.*, 14) Either Allied or DuPont was to receive the share of business from Standard Brass' Houston store. (*Id.*, 14)

Kaiser's "allotment" was "about every fourth truckload", and the other three truckloads were divided about two-to-one between DuPont and the other manufacturers. (*Id.*, 15) Sharpe explained to Gresham that he was only to make courtesy calls on Johnson Supply and Westbrook Supply since they were allotted to other manufacturers, and that if Kaiser pursued them heavily for business, "the chances were we would lose the accounts we had". (*Id.*, 15-16)

During his week with Rose, Gresham and Rose went through the Kaiser product manual and through customer files, and Gresham was advised with respect to the customers he was to call on. (*Id.*, 16) From his conversations with Rose, Gresham understood that Kaiser was "a smaller manufacturer of gas and we were allotted a percentage of

the market, and that the various customers had been established and we were to work with these customers." Rose advised Gresham that he was to work with Barnhart, Merfish, and Standard Brass (Port Arthur) and any other account that was not already established with a major manufacturer. (*Id.*, 17) Rose also advised Gresham of the various techniques utilized by Kaiser to meet competitive situations including "leakers", which was a "standard method of adjusting our price". (*Id.*) If it was necessary for Kaiser to cut prices, it would return a percent of non-leaking cylinders claimed to be "leakers" as a form of pricing discount. (*Id.*, 18) The leaker method was used in 1970 to give discounts to Barnhart, who was also a customer of Daiflon. (*Id.*, 20)

Gresham attended a Kaiser sales meeting in Dallas in June or July of 1970 which was also attended by Sorensen, the national sales manager, and Rose. At that meeting the parties discussed leakers, percentages of the market and Daiflon. (*Id.*, 27-28) Rose reported on the information which Gresham had furnished to him with respect to Daiflon's operations. (*Id.*, 28) Just prior to the sales meeting, in May or June of 1970, prior to the time that Daiflon built its plant, Gresham took photographs of the plant site and gave a report to Rose on the operation. (*Id.*, 29) Rose indicated at the meeting that Daiflon was coming into the area and that Kaiser was going to have problems with prices. (*Id.*, 29) He also stated that the Houston market would probably go down in price and that Kaiser had to come up with a method to contend with Daiflon. (*Id.*) Rose suggested that Kaiser put out the word that Daiflon was "wet gas". (*Id.*, 30)

During his training period Rose and Sharpe told Gresham that "we had a percentage of the market and if we tried to get more than that percentage, that we would suffer the consequences by losing some other accounts by price cutting, and this was my understanding of it". (*Id.*, 47-48)

He understood that the business might be lost to DuPont and Allied Chemical. (*Id.*, 48) In the industry DuPont was the largest company and there was a saying: "Don't kick the giant in the shins." (*Id.*) Frank Rose, Mike Sharpe, and the other Kaiser salesmen used this phrase. (*Id.*)

Rose left Gresham with the impression that Kaiser was not to try to sell Westbrook because it was not Kaiser's account. Rose stated that if Kaiser did try to sell Westbrook, it would cause repercussions in connection with the existing accounts which Kaiser had. (*Id.*, 48-49)

(b) *Cross Examination*

As a part of Gresham's training session he went to Kaiser's Gramercy, Louisiana plant at two different times, once for a sales training program, and the other for a Xerox sales training program. (*Id.*, 62) He was given instruction about the production of refrigerant gases, how they were manufactured, packaged, loaded and shipped. (*Id.*, 62-63) Also, during his indoctrination and orientation period he was given product manuals, information sheets and basic price information. He also received a document called "The Administrative Manual". (*Id.*, 65) The Administrative Manual outlined procedures with respect to obtaining prices, making sales, obtaining order forms and gave a general outline of the operating procedures of the sales office. (*Id.*)

Gresham opened up two new accounts as a Kaiser salesman — accounts that were not active with any other refrigerant company. (*Id.*, 66)

The refrigerant which was Gresham's "main mover" was R-22. (*Id.*, 68) Kaiser also sold R-113 which was obtained from another supplier. R-502 was a DuPont patent which Kaiser purchased from DuPont and resold. (*Id.*) Kaiser maintained R-502 in its inventory in order to "sell a complete line".

Gresham went through the Daiflon plant in January of 1971. At that time he had gone to Galveston to see Car-

ter about the possibility of going to work as a salesman. Carter gave him a tour of the plant and offered him a job and Gresham accepted it. However, he then had some second thoughts and declined the position. (*Id.*, 79) Gresham did not believe that the terms of the job offer from Daiflon were very good since, although he was to receive a salary and a car, it was "mostly on a commission basis of selling." (*Id.*)

Gresham did not have any authority to vary or deviate from the published price list or to give discounts in addition to those published. (*Id.*, 94) Any reduced price had to be approved by Rose. (*Id.*, 94) Gresham was never "directly" advised to allow credit for leaking cylinders that were not leaking. (*Id.*, 121)

Gresham resigned from Kaiser because he had an opportunity to go to work with a small company as a sales manager and he believed it would offer an opportunity to get into management and obtain an equity share in the company. (*Id.*, 158) However, the company went broke before that occurred. (*Id.*)

While employed by Kaiser as a salesman Gresham made a request to sell Westbrook, an Allied account. (*Id.*, 185) Gresham called on Friedrich Air Refrigeration in San Antonio, which was a DuPont account. Friedrich had requested that Kaiser install tanks for them to furnish refrigerant to charge the units that they manufactured, and Gresham filed a report with Kaiser requesting approval. His request was approved by Rose. (*Id.*, 186) Kaiser was hoping for 50% of Friedrich's business if it installed the tanks. (*Id.*)

(1-A) *Excluded Testimony of Gresham.*

The trial court excluded critical deposition testimony of Gresham relating to the destruction of evidence. Gresham testified that in June or July of 1970 his secretary received a call from Frank Rose's secretary. Rose's secretary advised Gresham to go through his files and "clear out my

information leading to special pricing and quotations. At that time I was in Beaumont. My secretary contacted me, and I went to Houston and cleaned out my records." (*Id.*, 42)

Gresham testified that, pursuant to Rose's request, he removed from his records information relating to special quotes and pricing, took them home and burned them. (*Id.*) Approximately a day or two later Rose called Gresham directly and asked if he had cleaned out his files as requested, and Gresham stated that he had, and the information had been burned. (*Id.*, 43) Gresham destroyed approximately 25 pieces of correspondence betwen Rose and himself.

(2) *Bernard Solon (by deposition taken November 20, 1973 in Houston, Texas)*

(a) *Direct Examination*

Bernard Solon ("Solon"), at the time his deposition was taken, resided in Houston, Texas and was employed by McQuiston Enterprises, a company engaged in the temporary labor business. (Solon Depo., 5) Solon had been employed by McQuiston for two years and prior to that time was with Kaiser for approximately a year and a half. (*Id.*, 6) During the period 1969 through 1970 he worked for Virginia Chemicals. (*Id.*, 14) For a three-month interval of time between his employment with Virginia Chemicals and Kaiser, Solon worked for Westbrook. (*Id.*, 15)

Solon terminated his employment with Kaiser in December of 1971 because Kaiser changed its marketing procedures. Kaiser had a cut-back in personnel. (*Id.*, 23) During Solon's employment with Kaiser he never had any difficulties with his supervisor, Frank Rose. (*Id.*, 27) Rose had trained Solon for his position. (*Id.*, 29-30)

In June of 1971 Solon attended a regional sales meeting which involved a discussion of Daiflon. The meeting, which lasted about two days, occurred following the time that Solon had sent a memorandum to Frank Rose regard-

ing Daiflon. (*Id.*, 65) In the spring of 1971 Rose had requested that Solon go to Galveston and review Daiflon's repackaging operation and report back. (*Id.*, 65-66) Solon thereafter drove to Galveston, parked his car near the Daiflon repackaging plant, walked around it to see how big it was and what type of storage tanks they had. (*Id.*, 66) He also took some pictures of a rail siding and storage tanks. After developing the pictures he sent them on to Rose. (*Id.*, 66) He did not talk to anyone at the plant, nor did he obtain any of Daiflon's price sheets. (*Id.*)

At the sales meeting in June of 1971 he showed slides of the pictures that he had taken in Galveston which reflected a concrete block building with a loading dock, a couple of storage tanks and some cylinders. (*Id.*, 67-68) The pictures were not clear. (*Id.*) Solon could not recall anything which was said at that meeting of any significance regarding his trip to Galveston. (*Id.*) He also reported that he did not feel that Daiflon was a factor in his territory; however, they had sold some gas in Houston. (*Id.*) Solon did not remember what he did with the slides or the negatives of the photographs which he took of the Daiflon plant. He was sure that he sent the entire package to Rose, (*Id.*, 78)

Solon stated that his method of selling refrigerant gas was a personalized one — he would take the wholesaler out to eat or to play golf. (*Id.*, 81-82) While at Kaiser he sold products at the prices reflected on the Kaiser price sheets. (*Id.*, 83)

He stated he did not know of any reason why there would be a price change during the course of his employment with Kaiser. (*Id.*, 84)

(b) *Cross Examination*

At the regional sales meeting where there was discussion of Daiflon. The individuals present also discussed other competitors such as DuPont and Allied Chemical. (*Id.*, 86) The discussion of Daiflon that occurred was not

unusual for a Kaiser sales meeting since at these meetings one of the most common topics is competition and what the company can do to better serve its customers. (*Id.*, 86) While at Kaiser, Solon was never told not to solicit business from anybody. He found the refrigerant gas business in 1971 to be very competitive. (*Id.*, 87)

(c) *Re-Direct Examination*

With respect to the regional sales meeting in June of 1971 Solon could not recall any specific discussion with respect to DuPont or Allied Chemical, nor could he recall any discussion with respect to Racon or Pennwalt. He did not take pictures of the facilities of any other company. (*Id.*, 90) Nor did he make any written report to Rose on any of the other manufacturers. (*Id.*, 90-91)

Daiflon was the only one of Kaiser's competitors that was selling refrigerant gas directly to contractors. (*Id.*, 92) With respect to his response on cross examination that the refrigerant gas market was competitive, Solon testified that he meant that "there were a lot of people selling refrigerant gas." (*Id.*, 93)

Solon was aware of West German refrigerant gas on the market but he never "bumped into it". (*Id.*, 100) He did not make any investigation or write a memorandum with respect to the West German gas. (*Id.*)

(3) *John Montrose (by deposition taken July 11, 1973 in Oakland, California*

(a) *Direct Examination*

John Montrose ("Montrose"), at the time his deposition was taken, was a sales agent for the sale of refrigeration products through distributors to the air conditioning-refrigeration industry. (Montrose Depo., 4-5) As a sales agent he represented Kaiser and NIBCO. (*Id.*, 5) Montrose sold packaged refrigerants for Kaiser, in grades R-11, R-12, R-22, R-13, R-114, R-500, R-502, and R-13. (*Id.*, 6) He had been employed by Kaiser since April, 1973 and acted pursuant to a written contract. (*Id.*)

Montrose was employed by Union Carbide for about seven years prior to the time that he entered into his contract with Kaiser. (*Id.*, 7) During the period 1969 to 1972 he was Market Manager for Carbide in New York and Zone Manager in California. As Market Manager his duties included market intelligence, and promotion of products. (*Id.*)

Montrose identified a letter dated June 7, 1971 which he received from his sales supervisor at Carbide, Quinn Harmon. (Pl. Exh. No. 4583) Attached to the letter was a copy of a Daiflon advertisement appearing in the Air Conditioning and Refrigeration News. Harmon states in the letter that the Daiflon advertisement "has caused considerable pricing upset in the wholesaler marketplace." (*Id.*, 12) Montrose state that he did not have a particular feeling "one way or another" about the advertisement and it was necessary to wait and see how Carbide's busines might be affected. (*Id.*)

Carbide never deviated from its policy of distributing R-12 and R-22 through air conditioning and refrigeration wholesalers. (*Id.*, 13)

Montrose identified a letter dated September 23, 1971 which he received from John Worthington of Union Carbide regarding the Refrigerants Advisory Council. (*Id.*, 29-30; Pl. Exh. No. 4591) The Refrigerants "Advisory Council" is a program initiated by Carbide where Carbide brought in five wholesalers and gave them an agenda with respect to Carbide's thoughts on advertising, sales aids, packaging, and related items. The program was put into effect in 1971 and there were two meetings; one in Las Vegas and one in Juarez. (*Id.*, 30-31) Carbide defrayed all expenses. (*Id.*, 31)

Union Carbide had maintained a "price stabilization program", which was "an effort to try to maintain some stability in the market and to say, in effect, at the end of the year we will give to all customers who purchased from

us — there was no limitation as to volume — a percentage, which I do not know, the profit back to them". (*Id.*, 37) The amount of profit was to be determined in the New York office of Carbide. (*Id.*)

Under the price stabilization program it was Carbide's policy to be competitive, and in the event of "price erosions" in the market, Carbide would be competitive under any circumstances. (*Id.*, 37) The Kaiser "trip program" was an example of price competition which Carbide would meet to remain competitive. (*Id.*, 37-38)

(b) *Cross Examination*

Montrose is not now, nor has he ever been, a Kaiser employee.

J. *Testimony of Third Party Witnesses (Wholesalers and Repackers)*

(1) *Paul E. Stewart (by deposition taken January 18, 1974 in Jacksonville, Florida)*

(a) *Direct Examination*

Paul E. Stewart ("Stewart"), at the time his deposition was taken, was President of Baker Brothers, a wholesale distributor in air conditioning and refrigeration equipment parts and supplies. He had been with Baker Brothers since 1954 and had been president since 1962. (Stewart Depo., 5-6) During the period 1968 to 1973 Stewart was responsible for the purchasing of refrigerants on behalf of Baker Brothers. (*Id.*, 6) At no time did Stewart advise any of his suppliers as to the price that Baker Brothers was receiving from other suppliers of refrigerant.

"Q. What was your policy with respect to advising your suppliers as to the prices that you were receiving from other suppliers?

A. No way.

Q. What do you mean by that?

A. I mean no way.

Q. Well, no way what?

A. There's no way that I would ever tell them.

Q. And this was true for the entire period of 1969?
A. That has been true forever.
Q. Well, tell me what has been true now during this period of time?
A. Bob, what you're obviously trying to get to, I, as president of Baker Brothers and the responsible party or refrigerant purchases, do I sit with one refrigerant representative and say: I'm getting a certain price from another, can you beat it. Is that what you're getting at?
Q. Or meet it.
A. Or meet it, that would be senseless. No.
Q. During the period '69 through '72 have you ever stated such in a conversation with any of the —
A. No.
Q. — of any of your suppliers?
A. (Witness shakes head indicating no.)
Q. Your answer is no?
A. No." (*Id.*, 20-21)

During the period 1969 to 1972 DuPont, Union Carbide, Pennwalt and Allied Chemical all, at one time or another, initiated special price discounts for Baker Brothers. (*Id.*, 22-23) At one time Baker Brothers was a subsidiary of Allied Chemical. (*Id.*, 24)

(1-X.) *Exhibits Relating to Testimony of Paul E. Stewart.*

Pl. Exh. No. 1117: DuPont "Request for Competitive Price Adjustment" approved by R. M. Glover March 12, 1970 which relates to a requested price adjustment for Baker Brothers and shows under paragraph 5(b) "Evidence Verifying Competitive Offer: Statements from Baker Management."

Pl. Exh. No. 1119: DuPont "Request for Competitive Price Adjustment" approved by Robert Wright, Jr. August 6, 1971 which relates to a requested price adjustment for Baker Brothers and shows under paragraph 5(b)

"Evidence Verifying Competitive Offer: Paul Stewart told W. H. Quill of this offer on 7/8/71."

Pl. Exh. No. 1120: DuPont "Request for Competitive Price Adjustment" approved by Robert Wright, Jr. March 24, 1972 which relates to a requested price adjustment for Baker Brothers and shows under paragraph 5(b) "Evidence Verifying Competitive Offer: Paul Stewart informed A. P. Dougherty on 3/10/72."

Pl. Exh. No. 1121: DuPont "Request for Competitive Price Adjustment" approved by D. C. Miller June 1, 1972 which relates to a requested price adjustment for Baker Brothers and shows under paragraph 5(b) "Evidence Verifying Competitive Offer: Paul Stewart informed A. P. Dougherty, Jr."

(2) *Harry Lynn (by deposition taken November 26, 1973 in Oklahoma City, Oklahoma)*

Harry Lynn ("Lynn"), at the time his deposition was taken, was Executive Vice President of Waugh Brothers Supply Company. He held that position since April, 1973. (Lynn Depo., 7-8) He had been an employee of Waugh Brothers for over thirty years. (*Id.*, 8) The chief executive officer of Waugh Brothers was John Waugh. (*Id.*) As vice president of Waugh Brothers, Lynn had no purchase responsibility. All purchases were handled by Woody Waugh, who died in April of 1973. (*Id.*, 9)

Lynn first became aware of Daiflon in 1971 due to the fact that Daiflon began to do quite a bit of advertising and promotion at that time. (*Id.*, 14) He considered Daiflon to be a potential competitor since they were attempting to sell Natkin Service Company, a Waugh Brothers account. (*Id.*) Daiflon was primarily attempting to sell R-22, but also offered R-12. (*Id.*, 15-16)

Daiflon remained in the market until some time during 1972. (*Id.*, 19) In 1971 Lynn was in the warehouse of Comfort, Inc. (a contractor) and was able to pick a tag off a Daiflon cylinder. (*Id.*) He delivered the tag with a letter to

Al Daugherty of DuPont stating that Waugh Brothers had evidence that Daiflon had made a shipment from Galveston, and reported the price at which Daiflon was selling. (*Id.*, 19-20) He also sent shipping tags to Smedley Ward at Pennwalt together with Daiflon pricing information. (*Id.*, 20-21) This information was sent to DuPont and Pennwalt at the suggestion of Woody Waugh due to the fact that Waugh wanted to inform his suppliers with respect to Waugh Brothers' competitive position with Daiflon. (*Id.*, 27-28)

In 1971 Lynn attended a meeting with Woody Waugh and representatives of DuPont where Daiflon was discussed. (*Id.*, 22-23) Waugh Brothers informed DuPont at that time that Daiflon appeared to be refilling refrigerant cylinders and selling them in competition to the other manufacturers and to Waugh Brothers. (*Id.*, 33)

Waugh Brothers had discovered that Carter Supply was filling cylinders in Tulsa and shipping them to refrigeration service contractors. (*Id.*, 35) Lynn wanted to write a letter to Waugh Brothers' customers pointing out that in order to maintain quality they should be certain that any supplier from which they purchased refrigerant handled the refrigerant in the same manner. (*Id.*) He requested and obtained a letter from Pennwalt describing their practice of cleaning, painting and otherwise servicing cylinders that were to be refilled with refrigerant and shipped to wholesalers. (*Id.*, 34)

After that letter was sent out to customers, Waugh Brothers did not receive any direct responses; however, there were a few inquiries made as to why the letter was written. (*Id.*, 37-38) Lynn did not receive any complaints from any of the customers of Waugh Brothers that had purchased cylinders from Carter Supply. (*Id.*, 39) He did receive one complaint from a customer of his who had purchased Daiflon gas with excessive moisture in it. (*Id.*, 40) Lynn has had some of his customers return Pennwalt re-

frigerant because of excessive moisture. (*Id.*, 40-41) Also, Waugh Brothers has had problems with leaking disposable cylinders. (*Id.*, 41) Disposable-type cylinders are less expensive and the manufacturers had problems with leaky valves. (*Id.*) That problem continued during the period 1970 through 1973. (*Id.*)

Lynn has discussed foreign gas with all of the suppliers of Waugh Brothers. However, he was unable to pinpoint any specific discussions. (*Id.*, 44-45)

(b) *Cross Examination*

Daiflon was offering to sell Comfort at prices lower than Waugh Brothers' prices. (*Id.*, 49) Daiflon took away part of Comfort's business from Waugh Brothers by offering refrigerant at lower prices. (*Id.*, 50) This same situation occurred at the Dolan Company and at Natkin. (*Id.*, 50-51)

(3) *John Waugh*

The trial transcript of John Waugh's testimony is not available since the court reporter advised that it could not be prepared prior to September 11, 1979. Consequently, the following summary is from memory, aided by trial notations:

(a) *Direct Examination*

John Waugh came on as a witness for Daiflon in resonse to a subpoena and stated that during the period 1967 through 1973 he was Chairman of the Board of Waugh Brothers Supply Company, Inc. ("Waugh Brothers") Waugh Brothers is engaged in the refrigeration parts and supply business with its place of business in Oklahoma City. The customers of Waugh Brothers are primarily contractors and servicemen. During the period of 1967 through 1973, John Waugh's brother, W. W. "Woody" Waugh, was president and Harry Lynn was vice president. Woody Waugh died April 16, 1973 and since that time John Waugh has been president of Waugh Brothers. He is familiar with Daiflon as a refrigerant. About 60% of his supplies are

furnished by DuPont and bout 40% by Pennwalt. Prior to the time that John Waugh took over as president, Woody was receiving discounts from DuPont as "five and three" off their price sheet and "six and three" from Pennwalt off their price sheet.[7]

(3-X). *Exhibits Relating to the Testimony of John Waugh.*

Pl. Exh. No. 1256: Letter from DuPont to Woody Waugh dated July 8, 1971 stating: "Please find enclosed credits for the wholesale discount amounting to $9,547.95. These credits cover the first six months of 1971."

(4) *Drexel L. Daily (by deposition taken February 13 and 14, 1974 in Birmingham, Alabama)*

(a) *Direct Examination*

Drexel L. Daily ("Daily"), at the time his deposition was taken, was Vice President and General Manager of Wittichen Supply Company in Birmingham, Alabama. (Daily Depo., 11) He had been employed by Wittichen since 1947 and is a stockholder and director of the company. (*Id.*, 11-12) Wittichen is a wholesaler of refrigeration and air conditioning supplies, parts and equipment. (*Id.*) As part of its business it sells refrigerant gas. (*Id.*, 12)

Wittichen's first line of refrigerant gas was DuPont and later it acquired a product line from Allied Chemical. (*Id.*, 18-19) DuPont and Allied are the two basic lines of refrigerant presently handled by Wittichen. (*Id.*, 19) During the 1969 through 1972 period Allied received about 60% of Wittichen's business and DuPont about 40%.

---

[7]Wright of DuPont stated that a $2,500.00 allowance was made to Waugh to offset the reported price that Climate Supply (a contractor) was receiving from Daiflon. He testified that an additional allowance of $3,000.00, reflected by DuPont documents, "sounded to me that either Daiflon cut their price or Climate's take got bigger." (Wright Depo., 208-209) Ward of Pennwalt testified: "The only two wholesalers with whom I had any connection were Solar Supply and Waugh Brothers." (Ward Depo., 94)

(*Id.*, 50-51) In the winter of 1970, Daily became concerned in connection with Daiflon's entry into the market. (*Id.*, 64-65) He was first aware of Daiflon's entry in 1969 through reading trade magazines and by general information, but he was not concerned at that time. (*Id.*, 66) He ha since had an occasion to make a file on Daiflon. (*Id.*)

Daiflon prices were lower than Wittichen's prices, and therefore, he wrote identical letters to DuPont and Allied Chemical. (Pl. Exh. Nos. 1005 and 3005) He received responses to both letters. (Pl. Exh. Nos. 1007 and 3006; See Exhibit "A", attached hereto)

After Daily received the letters from Allied and DuPont he began to wonder where Wittichen would stand as a company "in this new line of distribution". (*Id.*, 74) The "new line of distribution" resulted from the "bypassing the wholesaler". This was being done by Daiflon. (*Id.*, 74) Daiflon was selling directly to Wittichen's customers, while DuPont and Allied were selling to Wittichen and Wittichen was reselling. (*Id.*, 74) However, after analyzing the situation, Daily concluded that Daiflon was not a "big problem" for Wittichen. (*Id.*, 75-88)

(5) *Dudley Cawthon (by deposition taken January 15, 1974 in Miami Shores, Florida)*

(a) *Direct Examination*

Dudley Cawthon ("Cawthon"), at the time his deposition was taken, was executive director of information services for Supermarket Equipment, Inc. (Cawthon Depo., 3) He had served in that capacity since May 1, 1965. (*Id.*, 4) ISE was formed as a service to air conditioning, refrigeration supermarket distributors and contractors. (*Id.* 6) Cawthon stated that his group of companies had excellent results with the Daiflon product, and that laboratory tests showed that the Japanese refrigerant was lower in moisture content than the domestic product which he had received. (*Id.*, 58-59) The results of the tests as shown to ISE by Daiflon showed that the Daiflon product was lower than

the standards established by the American manufacturers. Daiflon gas was an excellent product. (*Id.*, 59)

(6) *Lewis A. Paul (by deposition taken November 16, 1973 and January 23, 1974 in Wichita, Kansas)*

Lewis A. Paul ("Paul"), at the time his deposition was taken, was chief executive officer of International Plastics, Inc., a corporation located in Colwich, Kansas. (Paul Depo., 5-6) The district court sustained several objections by the defendants to large parts of the Paul deposition. Accordingly, Daiflon believes that in view of these exclusions the deposition testimony of this witness is not significant for the purpose of providing the Court with a Narrative Statement of the Case. Therefore, his deposition testimony is not summarized.

K. *Daiflon's Expert Witnesses.*

(1) *Joseph Jadlow, Ph.D.*

(a) *Direct Examination*

Joseph Jadlow, Ph.D. ("Jadlow") is a Professor of Economics at Oklahoma State University. He has been on the Oklahoma State University faculty since the fall of 1968 and has been a full professor since 1976. (Jadlow, 1150) He received his Ph.D. in Economics in 1970 from the University of Virgina. (*Id.*, 1151) His field of specialization is price theory and applied price theory which includes the area of industrial organization and antitrust economics. (*Id.*) Jadlow is a member of the American Economic Association, the Missouri Valley Economic Association, the Western Economic Association, the Industrial Organization Society, and the Southern Economic Association. In 1975 and 1976 he did one year of study funded by the National Science Foundation regarding the relationship between market structure and innovation in therapeutic drug markets. In 1978 Jadlow did work for the Federal Trade Commission on the effects on research incentives of eliminating state anti-substitution laws. (*Id.*,

1152) Jadlow has served as a consultant in several antitrust cases, one of which was for the Federal Trade Commission in 1973. He has served as an expert witness on cost of capital for Southwestern Bell before the Oklahoma Corporation Commission. (*Id.*, 1152-1153)

Jadlow has authored a number of publications including approximately a dozen articles, various contract research final reports, and a number of unpublished papers. (*Id.*, 1153) The court determined that Jadlow was an expert in the field of economics. (*Id.*)

Jadlow was employed by Daiflon to study certain documents pertaining to the refrigerant gas market. (*Id.*) He reviewed the business plans of the defendants, the defendants' sales reports and related memoranda. (*Id.*, 1154) He also reviewed refrigerant monthly reports prepared by the defendant DuPont. (*Id.*)

Jadlow stated that the term "relevant market" is a way of defining the boundaries for both the supply and the demand side of a product. (*Id.*) In study of relevant market, Jadlow is particularly interested in determining whether there is a high degree of substitutability between different products in production, distribution and consumption. (*Id.*, 1154-1155) There are three particularly important factors: physical characteristics of the product, production methods and methods of distribution. (*Id.*, 1155)

With respect to the consumption side of the market, it is necessary to look at the cross-elasticity of demand. If there is a high cross-elasticity of demand between two products, they would be in the same market. (*Id.*, 1156-1157)

Jadlow defined the relevant product market in this case as being the non-automotive aftermarket for refrigerant gas. (*Id.*, 1158)

The term "monopoly power" has to do with whether a firm "has considerable discretion over the price it sets for its product, and it would be power to exclude compe-

tition." (*Id.*) In order to determine whether there is monopoly power in a particular industry, three factors must be considered: market structure, market conduct, and market performance. (*Id.*, 1158-1159) Market structure refers to the way the market is organized. It is necessary to determine the market share of the particular firm. (*Id.*, 1159) If the firm has over 40% of the market there is a good possibility that is has monopoly power. (*Id.*) Also, with respect to market structure, it is necessary to analyze the number of firms in the market. The smaller the number of firms, the more probable it is that there is monopoly power in the market. (*Id.*) An additional factor to consider is the combined market share of the leading firms in the market. Economists have traditionally tended to examine the combined market share of the largest four firms in the market. This is called the "four firm concentration ratio". (*Id.*, 1159-1160) The all manufacturing average four firm concentration ratio has tended to be around 39% according to a census of manufacturing data in the late 1960's and early 1970's. If it is determined that the four firm market concentration ratio gets well above 39%, economists would tend to conclude that there is a very good chance that high monopoly power exists in market. (*Id.*, 1160)

Also, with respect to market structure, entry barriers must be considered. It must be determined whether there are barriers to new firms entering the market. (*Id.*, 1161) An entry barrier means an obstacle or a disadvantage that a new firm in the market would encounter. For example, high capital requirements, cost disadvantages, established brand names, and control of resources or distribution channels all present entry barriers. (*Id.*, 1161)

Where there is a four firm concentration ratio of over 39% such a situation would be likely to lead to profits of those firms that are above a competitive level. (*Id.*, 1162)

With respect to market conduct, it is useful to look at

a firm's pricing policies. (*Id.*) If there is one firm that has repeatedly tended to be the price leader and the other firms have followed, there is a very good chance that such a firm has monopoly power. That is why it is the price leader. (*Id.*, 1162) Also, in this area it is important to look at the question of whether a particular firm or firms have practiced predatory pricing which means they practiced pricing policies that appear to be designed to injure another firm and drive that firm out of the market. (*Id.*, 1163) Another factor to examine with respect to market conduct is whether there has been price discrimination practiced by a firm or firms in the market. Price discrimination is not possible in a purely competitive market. (*Id.*, 1163)

If it is determined that a firm has monopoly power, it would also have monopoly profits. (*Id.*, 1164) It would earn a rate of return that is above the competitive level and in doing that there are different pricing strategies that a firm with monopoly power might practice. (*Id.*) The most obvious one is that the firm with monopoly power might set its price at a short run profit maximizing level — the price would be established at a level to permit the firm to make the highest possible immediate profits. However, if the firm with monopoly power sets its prices at such levels there is a very good possibility that other firms may undercut it in price and start taking away some of its market share. (*Id.*, 1164-1165) Also, new firms may enter by undercutting that price. (*Id.*, 1165)

Another possible pricing strategy is umbrella pricing — the price is set very high and other firms can get under the "price umbrella". (*Id.*) Another possible pricing strategy for a firm with monopoly power is "limit pricing". Limit pricing means that an established firm with monopoly power sets its price at a level that is not as high as the short run profit maximizing level. Instead, it is a little bit lower, and about at the level that any new entrant's average cost would be. (*Id.*, 1165) Accordingly, the price is set low

enough that a new firm entering the market is not able to make a profit. Market entry is limited and the monopoly firm foregoes some immediate profits it might have otherwise made by charging a higher price. (*Id.*)

Another possible strategy is "collusion". Even a firm with monopoly power might practice collusion because if it charges a high price, its competitors could undercut it in price and take some of its market shares. Therefore, it may practice price fixing with other firms. (*Id.*, 1166) If they all keep their prices at the monopoly level they maintain their same market shares. (*Id.*) However, in this situation a new entry may occur and new entrants may charge lower prices and take some of the market shares away from established firms. (*Id.*)

A final possible pricing strategy is "predatory credible threat pricing", or "exclusionary pricing". This is a combination of the other policies which have been discussed. The firm with monopoly power may begin by charging a short run maximizing price or a group of firms engaged in price fixing may charge the profit maximizing price, and if an entry occurs the established firm or firms may thereafter cut their price to below the cost of the new entrant, exclude the entrant from the business and then raise the price back to the profit maximizing level. (*Id.*)

The term "parallelism" is often used to describe a market situation where firms have identical policies with respect to various decision variables, such as prices. (*Id.*, 1168) Parallelism may suggest that there is collusion or monopoly power. (*Id.*, 1169) However, it does not mean by itself that there is collusion. (*Id.*) Parallelism must be taken into account along with other circumstances and events that are occurring in the market. (*Id.*) If you find a situation where costs of the firms in a market are all increasing, and demand is also going up for the product, and the firms lower their prices in unison, then there would be suspicious circumstances with respect to possible collu-

sion. (*Id.*, 1170) Such conduct would not seem to be economically rational and it would make one wonder if price fixing going on or some possible ulterior motive such as the elimination of a rival competitor that has a cost disadvantage. (*Id.*, 1170)

A study has been done by two economists in the Antitrust Division of the Justice Department which has been published by an article reporting the results in the Journal of Law and Economics of the University of Chicago Law School (1974). They examined all price fixing cases that had been won by the Justice Department for a period of ten years (65 cases). (*Id.*) They found three common structural characteristics of the market involved. In about 80% of the cases where price fixing existed there tended to be a small number of sellers in the market. (*Id.*, 1171) In 80% of the cases there were less than ten firms in the markets involved. (*Id.*, 1171-1172)

Another characteristic was that there tended to be high market concentration in most of the markets, i.e., a high four firm concentration ratio. (*Id.*, 1172) The most frequent level of four firm concentration ratio was approximately 75% of the market. That is, the four largest firms controlled over 75% of the market. (*Id.*) A final characteristic in price fixing cases studied was that in almost every case there was a homogeneous product. (*Id.*)

The non-automotive aftermarket in refrigerant gas would be a homogeneous product. (*Id.*, 1172-1173) Assuming a situation existed where there were six manufacturers of refrigerant gas in the non-automotive market and four of the firms had over 90% of the market, then that would be considered to be a "very high concentration". (*Id.*, 1173)

(b) *Cross Examination*

Jadlow's dissertation for which he received his Ph.D. was in connection with the study of the economic effects of the prescription drug laws. (*Id.*, 1174) Jadlow's testi-

mony in this case was his first excursion into the refrigerant gas industry. (*Id.*) All of his knowledge regarding the industry is based upon materials provided by the attorneys for Daiflon. (*Id.*, 1174-1175) Prior to his testimony Jadlow had discussions with Daiflon's attorneys and with Carter. (*Id.*, 1176)

Jadlow, from a theoretical economic standpoint, is an advocate of vigorous and healthy competition. (*Id.*, 1177) The policy underlying the antitrust laws is not to protect inefficient producers. (*Id.*) Nor is the economic policy underlying the antitrust laws designed to shelter an individual competitor from competition. (*Id.*) The mere fact that an inefficient producer goes out of business, in itself, is neither pro-competitive, nor anti-competitive. (*Id.*), 1179-1180)

Jadlow excluded the automotive aftermarket from his definition of the relevant market because in reviewing the defendants' documents it appeared that the distribution channels are quite different for the automotive aftermarket as compared to the non-automotive aftermarket. (*Id.*, 1182) This is particularly pointed out by DuPont in its Business Plan dated November 1, 1970. (*Id.*) The automotive market provides replacement refrigerant gas for automobiles while the non-automotive aftermarket provides replacement refrigerant gas for refrigeration and air conditioning equipment. (*Id.*, 1183)

In preparing to testify, Jadlow did not review any work done by Mr. Scott Campbell. (*Id.*, 1211-1212) He has not met Campbell. (*Id.*, 1212)

The term "oligopoly" means an industry where there is a relatively limited number of sellers. (*Id.*, 1213-1241) Jadlow is acquainted with Richard A. Leftwich and recognizes him to be a competent and qualified economist. He is a colleague of Jadlow's in the Department of Economics at Oklahoma State University. (*Id.*, 1213-1214) Jadlow is familiar with a book by Leftwich entitled *Price System*

and Resource Allocation, with the last edition published in 1979. (*Id.*, 1215) Jadlow agrees with Leftwich's statement at page 308 of his book that it is a mistake to characterize all oligopolistic industries as collusive. (*Id.*, 1216) Jadlow agrees with the statement from Areeda and Turner's article entitled "Predatory Pricing and Related Practices" that:

> "Proven cases of predatory pricing have been extremely rare. That predatory pricing seems highly unlikely does not necessarily mean that there should be no antitrust rules against it, but it does suggest that extreme care be taken in formulating such rules less the threat of litigation, particularly by private parties materially deter legitimate competitive pricing." (*Id.*, 1220-1221)

(c) *Re-Direct Examination*

Predatory pricing is any temporary price cut designed to eliminate a competitor and it would be followed by price increases back up to a monopoly price level. Jadlow was then asked the following question:

> "Q. Then, let me give you a hypothetical question and let you apply your definition to the hypothetical question:
>
> As a hypothetical question, Dr. Jadlow, if there were say six manufacturers of a product such as refrigerant gas, and a seventh source different from the six was introduced into the market, and during the period of time of two years the costs of the manufacture of the refrigerant gas was increasing, and the seventh source opens a plant for the repackaging of the refrigerant gas in January of one year, and in March of the same year there's a price decrease, simultaneously by the six manufacturers of approximately 13 percent, followed by another price decrease the following year to the extent that the seventh entrant closes down its business, and simultaneous with

the closing down of its business in October of the same year, the six manufacturers again simultaneously increase their prices some 8 percent, and then, in December of the same year, create another price increase to get back to the increase that existed just after the 7th entry or the seventh source entered into the market, what would that indicate to you with regard to predatory pricing?"

* * *

(Argument of counsel deleted)

A. This could be a situation that predatory pricing could be applied to, particularly if costs are increasing throughout the time when prices were being cut.

The case would be even stronger if demand was increasing throughout the time that prices were being cut.

So, it would possibly fit the predatory pricing category." (*Id.*, 1224-1226)

(d) *Re-Cross Examination*

There is a good deal of disagreement with respect to what should be considered to be predatory pricing. (*Id.*, 1227) Predatory pricing can be described as a situation where prices are lowered below the cost of a competitor with a specific intent of eliminating that competitor from the market. (*Id.*) The product is priced below the cost of the rival that is sought to be eliminated. The price is not necessarily below the total cost to the firm that is cutting the price. (*Id.*) The price cutter could be selling above his total cost or he could be selling below his total cost.

(2) *Benton Gup, Ph.D.*

(a) *The Elements of Dr. Gup's Theory as Adduced During Direct and Cross Examination*

Benton E. Gup, Ph.D. ("Gup"), received his B.A., M.B.A., and Ph.D. (Economics) at the University of Cin-

cinnati. His experience includes a professorship of Economics at the University of Cincinnati, and two and one-half years as staff economist of the Federal Reserve Bank in Cleveland, Ohio. (Gup, 942) He currently is the Professor and Holder of the University of Tulsa Chair of Banking and Finance. He also operates a consulting firm, General Economic Research Corporation, and is an officer in the Financial Management Association, a large professional financial management group. (*Id.*, 942-943) Gup is the author of several books, including a recently published work called *The Basics of Investing*, and is currently authoring a book dealing with strategic business planning to be published by McGraw-Hill. (*Id.*, 944)

Gup was employed by Daiflon in 1973 to determine the fair market value of the company as it would have existed in a free environment in 1972. (*Id.*, 954-946) In the process he reviewed certain financial records of Daiflon including balance sheets, income statements and price and cost data. (*Id.*) Gup reviewed information furnished by DuPont during discovery concerning "sales and outlook" and reviewed security analysts' reports dealing with various companies in the industry. (*Id.*) Additionally, he inspected the DuPont Business Plan, DuPont's field distribution reports, and the published price sheets of all defendants. (*Id.*, 947)

Gup testified that he developed a sound method whereby the value of Daiflon could be determined and proceeded to obtain data from which that determination could be made. (*Id.*, 948) Factors reviewed involved the size of the market, the market share and other relevant financial data. His method involved a statistical technique called "simulation" involving the estimation of certain minimum and maximum values which were then fed into a computer which calculates thousands of combinations, randomly selecting numbers to determine a range of estimates. (*Id.*, 953) Gup discussed his findings in detail and concluded

that the minimum value of the company could be as low as $610,000.00 and the maximum value could be almost $13,000,000.00. (*Id.*, 954) The most likely number, according to Gup, was $2.96 million: "*** based on standard statistical technique, we know that the chances are 68 out of 100 that the actual value of this firm, based upon the assumption that I have in the model and the numbers that we have shown, will fall between $1.2 million and $4.7 million. But, this $2.96 million is the most likely to occur." (*Id.*, 954-955) He continued:

> "As a professional economist and financial analyst, I use my considered judgement to determine these numbers, that is, these are the numbers that were put into the computer. The computer had, built into it this model that I have just described to you.
>
> * * *
>
> I believe that this particular model is the best one for determining the value of a going concern, and is one that is widely accepted and used for determining the value of going concerns." (*Id.*, 956)

The numbers that were put into the computer were selected by Gup after considerable study and analyses as follows:

Item	THE PERAMETERS Value		
	Minimum	Most Likely	Maximum
1 Pounds (millions)	100	142	200
2 Compound Growth Rate	.020	.120	.180
3 Number of Years	5	10	15
4 Price Per Pound (weighted average)	.450	.600	.750
5 Market Share	.005	.020	.030
6 Net Income as % of Sales	.040	.060	.100
7 Discount Rate	.040	.055	.083

Gup testified that the specific numbers used to estab-

lish the range of factors described above were obtained from generally available business statistics put out by the United States government, certain recognized reporting organizations, documents furnished by DuPont and financial statements and price lists submitted by Daiflon. (*Id.*, 963) Additionally, Gup spent approximately 40 to 50 hours in discussion with Mr. Carter. (*Id.*, 964-965) The figures for poundage and compound growth rate (items 1 and 2, *supra*.) were derived by Gup from his analysis of the DuPont Business Plan and economic data reflecting the dramatic growth in housing starts and consumer durables, the level of economic activity that was going on at that time (1972). The discount rates were determined by Gup's taking into account the rates of returns and investor's expectations in other chemical companies together with industrial averages of the rate of return in connection with 425 other companies:

> "This gives you the return that an average — on what professionals consider the average risk, an average market company, as a bench marker." (*Id.*, 1096-1097)

With respect to the figures used by Gup in connection with net income as a percent of sales, the numbers were derived from Standard & Poors Value Line Survey and similar sources. (*Id.*, 1118-1119) The price per pound on a weighted average basis was obtained through Gup's analysis of price sheets furnished by defendants and Daiflon. (*Id.*, 1073) Gup assumed that the capacity, growth and capital expenditures would all vary over a time to meet demands. (*Id.*, 1075)

Gup testified that the numbers utilized for market shares, ranging from 1/2 of 1% to 3% were determined by an examination of Daiflon's financial statements, and its actual sales as a percentage of the total market as he determined it. (*Id.*, 1090-1093)

Gup explained the "number of years" utilized in his method:

"A. What I'm saying in this case, how long is this firm going to continue to exist over a time?

So these are really the outside numbers, and you had to make an assumption, and in this case I had the assumption it would last a minimum of five or at least five years. It could go out as far as ten years or it may even last as long as fifteen years. A corporation is an ongoing organization. It actually could go on longer. Here it is seven or eight years beyond when we started the case, Mr. Carter is still in good health and running business, so these numbers are certainly within the limits.

We ran a number of simulations where I used ten, fifteen, twenty, instead of five, ten, fifteen, and the values came out approximately double or more what they were.

But after discussions with Mr. Carter and reviewing the data and taking into account what a business of this type might reasonably expect — be expected to last, I settled on the five, ten, fifteen range.

If it were a public utility, I might look at thirty years, or a hot dog stand, you look at a year, so you have to take into account the general nature of the business, and based upon my judgment, I settled on five, ten, fifteen." (*Id.*, 1055-1056)

(b) *Cross Examination*

As indicated above, parts of the cross-examination of Gup have been related in connection with the discussion of the basic elements of his economic theory. A summary of the balance of the cross examination, as conducted by counsel for Pennwalt, is hereinafter summarized.

The computer programming which Gup utilized was performed by Fadel Iskander, an associate of Gup's at the University of Tulsa. (*Id.*, 959-960) Gup has an understanding of the model that went into the computer, and he

understands how to interpret the output. (*Id.*, 960-961) Gup checked Iskander's output and input; he did not check the computer program itself. (*Id.*, 962)

This was Gup's first professional look at the refrigerant industry. (*Id.*, 962-963) He utilized some general knowledge of the economy in addition to his analysis of documents and discussions with Carter. (*Id.*, 960-962) He did not read any of the depositions in the case, nor did he read the trial transcript. (*Id.*, 964) He spent approximately 40 to 50 hours with Carter. (*Id.*, 965) Gup is satisfied that Iskander's program was correct and that he correctly "cranked in" the growth of the market. (*Id.*, 966-967) Each of the items that are listed on the model were put in correctly because they were disclosed on the print out which Gup received once the entire program had been run. The program shows the input and the results that come out and the input can be checked against the results. (*Id.*, 967) With respect to the random selection of numbers that are put into the computer, even though the computer can pick out anywhere within the extremes, most of the selection would be around the "most likely" value. (*Id.*, 969) The most likely range for the value of Daiflon is $2.96 million and the chances are 68 out of 100 that it will fall between $1.22 million and $4.71 million. (*Id.*, 970) This is a statistical concept. (*Id.*, 971)

At pages 983 through 1012 of Gup's cross examination, the witness was given a hand calculator and asked a number of questions which assumed the use of different variables in his economic model.

At pages 1016 through 1025 Gup is cross examined with respect to his understanding and analysis of the computer program which was prepared by Iskander and utilized by him in connection with his conclusions as to value.

At the time that Gup was retained as an expert witness, he was shown a statement by Daiflon's counsel that showed a value of $3,000,000.00 for the company. (*Id.*,

1026) Gup's conclusions as to value were arrived at independently. (*Id.*, 1026) Gup's motive was to determine the fair market value. His state of mind was to do the best possible job as a professional. The $3,000,000.00 figure is actually a relatively low number compared to some of the earlier numbers that were generated using that method. (*Id.*, 1026-1027) A logical consequence of Daiflon's growth was movement into the automotive aftermarket. (*Id.*, 1046) When Gup first talked to Carter they discussed the background of Carter's business and what some of his visions were for the future together with expansion into different markets. One would "expect that a company doesn't stay in exactly the same product, but they modify." (*Id.*, 1047) Gup's task as an economist is to determine what a firm will look like in the future and how it will grow and expand. (*Id.*) It is normal to assume in a given life cycle that a firm will go from a relatively simple product into a more complex product and introduce manufacturing facilities. (*Id.*)

In determining appropriate growth rates for use in the model, Gup analyzed the general level of economic activity, the increased demand for consumer durable good, the rise in housing starts and the growth of gross national product. He did take into consideration a 20% growth figure in the automotive market. (*Id.*)

The type of product Daiflon was acquiring from Japan could have been acquired elsewhere. It is not unique to Japan so that if there were a disrupted flow because of a cartel or an international incident, Daiflon could have obtained a similar or identical product from another source. (*Id.*, 1061) A firm such as Daiflon which is dealing in international markets faces the risk of fluctuating exchange rates. (*Id.*, 1062) Gup assumed that Daiflon would have a continuous source of supply, and that ultimately the company would expand into manufacturing and produce either all or most of its own needs. (*Id.*)

Gup's figures with respect to projected net income are

based upon the assumption that Daiflon would ultimately expand into a manufacturing company. Also, Daiflon acted in the same market as the manufacturers did. Gup utilized the best information available. (*Id.*, 1063)

With respect to the most likely price per pound figure which Gup utilized (60 cents), that represents a weighted price to take into account the different amounts of R-12 and R-22 that Daiflon was selling. (*Id.*, 1065-1066) Gup did not take into account the possibility that because Daiflon did not have a disposable cylinder it might have had to be satisfied with a lower price than the defendants were charging. This is because he made the assumption that his product would vary over time, as did its manufacturing capability. (*Id.*, 1074) No consideration was given to Daiflon's past pricing practices. (*Id.*) He did not take into account the fact that Daiflon did not sell R-502. (*Id.*, 1074-1075) He did not consider, in coming up with the 60 cent most likely sales price, the ratio of the industry's capacity with respect to refrigerants R-12 and R-22. (*Id.*, 1075) Gup assumed that the capacity, growth and capital expenditures would vary over time to meet demands. (*Id.*) Gup assumed that refrigerant gas was a homogeneous product and that the price would be the same throughout the industry. (*Id.*)

At one time Gup sued Carter to collect money which Carter owed because he was paying too slowly. Carter has now paid Gup everything that Gup is owed. (*Id.*, 1086-1087) At the time that the lawsuit against Carter was settled, Gup had not yet communicated to Carter his findings. (*Id.*, 1087-1088) The role of market share in determining the most likely value of a company is very important. (*Id.*, 1089) In determining the most likely market share, Gup went back a considerable number of years, examined financial documents, and calculated a market share. (*Id.*, 1090)

When McDonald paid $100,000.00 for 50% of the

Daiflon stock in 1971 he appears to have received a good bargain. (*Id.*, 1100-1101) However, this assumes a freely competitive environment going forward from 1972; and in 1971 this was not the case. (*Id.*, 1101) In determining net income Gup studied general financial data concerning the financial statements of 425 companies. (*Id.*, 1103) He selected figures based on three factors; (1) the figures were the best data that were available to work with; (2) Daiflon, to some extent in its distribution network, acted in a fashion similar to manufacturers; and (3) he assumed that over a time Daiflon would do some of its own manufacturing. (*Id.*, 1104) The financial information from the 425 companies, contained in Standard & Poors Value Line Data, provided a frame of reference. (*Id.*, 1106)

Gup had no knowledge of the testimony of either Carter or McDonald at trial. (*Id.*, 1110-1111) Gup did not use Daiflon's actual cost data; however, he did examine their financial statements. (*Id.*, 1111) He did not conceive it to be his function to get around the fact that Daiflon had losses. (*Id.*, 1112) He did not use Carter's cost statistics and did not remember making a specific assumption about the cost of Japanese gas. (*Id.*, 1113) Gup had no knowledge with respect to the method utilized by Daiflon in acquiring gas from Japan and distributing that gas subsequently. (*Id.*, 1114)

Gup did not take into consideration the imposition of the surcharge in 1971 or the subsequent devaluation of the dollar against the yen. (*Id.*, 1121) He was aware of the devaluation because one of the sources utilized was the "U.S. Industrial Outlook, 1973" which discusses this matter. (*Id.*, 1122)

The surcharge imposed in 1971 would have eaten up the 3.6 cents a pound net income shown on Daiflon's answer to certain interrogatories. (*Id.*, 1128-1133)

(c) *Re-Direct Examination*

If DuPont or Pennwalt were making a 3.6 cents per

pound profit on their sales, and the selling prices remained the same, but inflation came along at the rate of 7%, it would eat up that profit. (*Id.*, 1133)

It is necessary to differentiate between the cost to a company importing from Japan as opposed to the cost to a competitive company in the United States. (*Id.*, 1134) The reason that Gup did not consider the surcharge and devaluation in arriving at his conclusion was explained as follows:

> "A. Well, my task was to look at the firm starting from 1972 on, and it's very much like a physician looking at a child trying to predict what that child is going to look like three, four, five, ten, or perhaps even fifteen years, and in that position making his judgment, he is not going to look at a sickly child that is dying, that is terminal, that is going to expire at the end of a few years, and that was the case of Daiflon.
>
> It was a dying firm during the period these costs were being presented. He is going to look at a healthy child and say against normal healthy children, this is what I expect this normal healthy firm to do.
>
> So, I didn't use Daiflon costs because it was a sickly dying firm. I looked at relevant financial statistics for firms that were growing in the normal environment." (*Id.*, 1137-1138)

In determining the compound growth rate to be utilized, Gup took into consideration the DuPont Business Plan, the general economic background which included a dramatic in housing starts and consumer durables, the level of economic activity going on at that time. (*Id.*, 1140)

Gup did not have any "hard facts" with respect to his proposition that Daiflon would expand into the automotive industry. (*Id.*, 1143) However, such "hard facts" were not necessary to his conclusions. (*Id.*) With respect to deter-

mination of market share, he had considered that Daiflon may expand faster or slower than other companies and that the least number should be 1/2 of 1% and the greatest number could reach 3% in the future, and "somewhere within that range is a reasonable expectation that they will find a share of the market. Two percent was the number that came out to be the most likely number." (*Id.*)

Gup's settlement of his lawsuit with Carter had absolutely no effect upon his professional calculations. (*Id.*) He was being paid for his services on an hourly basis. (*Id.*)

Fadel Iskander has a computer programming service and performs work for other individuals and many "academics". (*Id.*, 1145) Iskander has performed programming for several dissertations using the same statistical methodology which has been presented in this case. Iskander's services were performed under the direction of Gup. (*Id.*, 1145)

In developing the model to value Daiflon, Gup supposed an environment free from predatory pricing and monoplies. (*Id.*) Gup assumed that the firm would be free of any predatory pricing practices, monopolistic prices and could grow in a free environment. (*Id.*, 1146) Gup's method is based upon sound financial methods and proven statistical techniques, and the results are "very conservative". (*Id.*, 1147) Gup stated that if he was given the assignment to value Daiflon once again, given trial examination and cross examination, he would utilize exactly the same processes and methodology. (*Id.*)

(3) *Scott Campbell*

(a) *Direct Examination*

Scott Campbell ("Campbell"), a certified public accountant, is employed by Main-Lafrentz & Co. in Tulsa, Oklahoma as Senior Staff Accountant. (Campbell, 838-841) Campbell was employed by Daiflon in March of 1978 for the purpose of summarizing DuPont price lists, certain customer price authorizations and DuPont costing

information from the period January, 1969 through December, 1972. (*Id.*, 842-843) Costing information was obtained from DuPont's answers to interrogatories. (*Id.*, 843) Cambell's findings were based entirely upon the documents of the defendants which were furnished to him by Daiflon's counsel. He then prepared charts to reflect his observations. (*Id.*, 844-845) Campbell is a member of the American Institute of Certified Public Accountants and the Oklahoma State Society of Certified Public Accountants. The court determined that he was qualified to testify as a certified public accountant "and to check the books and records and tell this jury what he finds." (*Id.*, 845-846)

Chart No. 1, prepared by Campbell, represented DuPont's sales to Tersco, Inc. (West Texas). (*Id.*, 847) He charted the list price for refrigerants R-12 and R-22 as furnished by DuPont, the net sales price as calculated from the discounts shown on the competitive price authorizations, and DuPont's costs. (*Id.*, 848) The price per pound for refrigerants was reflected vertically on the left side of the graph and the time period (January, 1969 to January, 1973) was shown horizontally on the bottom of the graph. (*Id.*)

The costing information charted by Campbell was directly from DuPont's answers to interrogatories and included standard mill costs, adjustment to standard mill costs, research and development costs, selling expenses and administrative expense. (*Id.*, 848-849) In March of 1972 DuPont's net sales price with respect to sales to Tersco was below its full cost. (*Id.*)

In determining DuPont's net sales price there were several price adjustments that Campbell could not include in his calculation. (*Id.*, 851) Examples are credits for leaking cylinders that did not actually leak, prompt payment discounts and cash rebates (such as $3,000.00 year-end rebates). (*Id.*, 851-852) The reason that rebates could not be taken into consideration is that Campbell did not know

how many pounds of refrigerant were sold to an individual wholesaler, and it would have been necessary to take the dollar amount and divide it by the number of pounds, and thereafter apply that percentage to the price per pound. (*Id.*, 853)

The costs as plotted on the chart showed some decreases between the years 1969 to 1972; however, if costs increased during that period of time the relationship between full cost and net price would have been affected.[9] (*Id.*, 854-855)

Campbell then exhibited other charts relating to DuPont's sales of R-12 and R-22 to Tersco and Waugh Brothers during the period 1969 through 1972. (*Id.*, 857-865)

(b) *Cross Examination*

Campbell has no independent knowledge with respect to DuPont's list prices, actual net sales price and costs other than the material with which he was provided. (*Id.*, 866) With respect to DuPont's list prices Campbell relied on Pl. Exh. Nos. 517-521 which were DuPont's list prices as provided by DuPont. (*Id.*, 866-867) With respect to DuPont's costs, Campbell relied upon Pl. Exh. Nos. 1355-1357, which were DuPont's costing information as provided by DuPont. (*Id.*, 867-868) Campbell did not determine DuPont's costs — he plotted their costs. (*Id.*, 868) Costing information utilized by Campbell in preparation of the graphs were "total cost figures". (*Id.*, 869)

With respect to DuPont's net sales prices Campbell relied upon the published price lists which included standard discounts and competitive price authorizations furnished by DuPont to Daiflon. (*Id.*, 871) With respect to the information relating to DuPont's sales to Tersco,

---

[9]On January 4, 1972 Wright of DuPont forecasted "an 8% increase in pound sales in 1972 with a continued decline in earnings due to lower prices in the marketplace, increased mill costs, freight, packaging costs, the Corpus Christi project ***." (Pl. Exh. No. 1309, p. 6)

Campbell relied upon Pl. Exh. Nos. 1179-1181. With respect to Waugh Brothers, he relied upon Pl. Exh. Nos. 1182, 1183, 1186, 1189, 1190-92 and 1194. Campbell relied "exclusively and solely" on the materials and documents provided by DuPont. (*Id.*, 873)

Campbell was not furnished with any invoices relating to DuPont's sales. An invoice would be the document in the normal course of business which would establish the specific facts as to a particular sales transaction. (*Id.*, 874)

Looking at Chart No. 6, which represents sales by DuPont to Tersco of R-22 in 25-lb. cylinders, Campbell stated that he did not know whether DuPont sold product to Tersco during the period January, 1972 to April, 1972. The charts are based upon the price that would have been charged if a sale had actually been made. (*Id.*, 878) The chart is based on documents that do purport to show that sales are being made to Tersco. (*Id.*) The CPA's with respect to Tersco did not expressly indicate that DuPont sold R-22 to Tersco during the period January, 1972 to April, 1972. Campbell did not actually know if DuPont made sales to Tersco or not during that period. (*Id.*, 880) He did not know whether DuPont actually sold to Tersco at below cost prices. (*Id.*) The chart purports to show sales below cost, and since Campbell did not know whether sales were actually made, one would term the chart to be misleading. (*Id.*, 881-882)

Campbell was told by Daiflon's counsel, in connection with the preparation of his testimony, to assume that orders from DuPont were made in large quantities and that all applicable discounts were taken. (*Id.*, 883) The two assumptions made with respect to Tersco were that (1) sales were made to Tersco; and (2) that the sales were in such amounts as would qualify for the discount specified in the CPA's. (*Id.*, 883-884) The same assumptions were made with respect to charts for Waugh Brothers. (*Id.*, 885)

The chart relating to Tersco would be misleading if in

fact DuPont did not make sales to Tersco during the relevant period of time. (*Id.*, 886) Another assumption made by Campbell was that the discounts remained in effect until the next price change. (*Id.*, 891) He had no supporting facts for that assumption. (*Id.*)

Campbell's charts showed DuPont's costs in February and March of 1972 to be about $0.70 cents a pound. In Pl. Exh. No. 1357 DuPont provides "year to date costs" which show costs of $0.59 cents per pound for the period January of 1972 through April, 1972. However, Campbell plotted January of 1972 costs which is shown as 70.18 cents a pound. (*Id.*, 895) He then assumed that the cost figures continued in effect into February and March. (*Id.*, 896) If DuPont's total costs for the period in January, 1972 were .70 cents per pound, and its costs on a year-to-date basis through April, 1972 were .59 cents a pound, it would necessarily follow that its costs in February and March were lower than .70 cents a pound. (*Id.*, 897) Campbell plotted the costs at each quarter and then connected the lines, and that may be an inaccurate representation. (*Id.*, 898)

Campbell was not told how to plot the chart by Daiflon's lawyers, rather he personally plotted the chart and drew connecting lines. (*Id.*, 899) Campbell plotted the costing information on all the charts in the same manner for the period January, 1972 through April, 1972, and the "bulge" shown on the chart for that period of time is inaccurate. (*Id.*, 899-890) The only time the charts purport to show sales below cost by DuPont was during the period January, 1972 through April, 1972. Cost data for that period of time was inaccurately plotted. (*Id.*, 900-901)

At certain periods of time Campbell did not have costing information available from DuPont records for 50-lb. and 60-lb. cylinders. (*Id.*, 906) However, for the period April 1, 1972 through January 1, 1973 he had different cost information for 50-lb. and 60-lb. cylinders. The cost information on the chart with respect to 50-lb. cylinders

during that period of time is inaccurate. (*Id.*, 907-908)

Campbell became a CPA a little over one year ago and received his degree in accountancy in 1973. (*Id.*, 910) He took his CPA examination four times with the last time being in November, 1977. (*Id.*, 911) His work at Main-Lafrentz consists of approximately 80% tax work and 20% auditing and management services. (*Id.*, 911-912) The last time that he analyzed costing information, prior to his employment in this case, was several years ago. (*Id.*, 912)

(c) *Re-Direct Examination*

The number of people that passed the examination for certified public accountancy is approximately 10% each time. When one becomes a CPA he is expected to follow the accounting and auditing standards of the association of which he is a member. (*Id.*, 914-915) It is not unusual for accountants to take the CPA exam more times than Campbell did and fail it. (*Id.*, 916) CPA's are in the minority of all accountants practicing accounting.. (*Id.*, 916)

Campbell did not endeavor to conduct an audit of the DuPont Sales of refrigerant gas. (*Id.*,) In fact, he could not have conducterd an audit with the information furnished. (*Id.*, 917) To do an audit it would be necessary to examine sales invoices, credit memorandums and voluminous additional documents. (*Id.*,) It would be necessary for him to examine all invoices. (*Id.*,) Campbell did not purport to verify all sales of refrigerant gas. (*Id.*, 918) Nor was it a term of his employment to verify cost information. (*Id.*,)

Pl. Exh. No. 1195 is a competitive price authorization for DuPont relating to Waugh Brothers. (*Id.*, 919) That document provides the customers name, the product and grade involved, and the current DuPont selling price. (*Id.*, 920) It also shows the list price, the total annual refrigerant pound volume purchased by Waugh Brothers. (*Id.*, 921) With respect to Pl. Exh. No. 1195, it reflects 750,000 pounds purchased annually by Waugh Brothers. (*Id.*, 921) The

CPA also shows the major suppliers and the percentage of penetration of each. On this document it shows DuPont at 49%. (*Id.*, 921)

From the CPA's Campbell was able to determine information that pertained to the type of cylinders the product was sold in. (*Id.*,) The CPA's show the total number of pounds that each supplier has supplied during the year to the customer and the type of product and what type of cylinder the product was sold in. (*Id.*, 924) The vertical lines on the charts (product sales) are plotted on a quarterly basis. (*Id.*, 925)

The information placed on the charts was solely from information provided by DuPont. (*Id.*, 930)

II. THE EVIDENCE PRESENTED BY DAIFOLN DURING DEFENDANTS' CASE IN CHIEF.

Defendants' witness list, filed on March 19, 1979 (two weeks into trial) contained the names of 21 individuals. However, only six witnesses were in fact called: Bradfield, Robertson (by deposition), Stone (by deposition), Wilson, McHugh and Hibdon. It is anticipated that defendants, in their Narrative Statement of the Case, will relate the evidence adduced from each of these witnesses. However, during the course of the cross examination of certain of the witnesses, evidence was presented which is properly part of Daiflon's Narrative Statement of the Case, and therefore Daiflon submits the following summaries:

A. *Michael Bradfield (Cross Examination)*

Michael Bradfield, a Washington attorney, testified on direct examination with respect to his employment as assistant general counsel for International Affairs of the Treasury Department, and his involvement and conclusions with respect to the import surcharge of 1971 and the subsequent change of currency relationships between the United States and Japan. (Bradfield, 4-41) During cross examination Bradfield stated that he is associated with the

law firm of Cole, Carett & Bradfield, which at one time had been engaged by Allied Chemical Company to perform certain services before the Export-Import Bank of the United States.

With respect to the condition of the balance of payments for the United States, there was a deficit of $4,000,000,000 in 1972 and the deficit for 1978 was approximately $12,000,000,000 (*Id.*, 1233) The negotiations at Camp David in 1971 prior to the imposition of the surcharge dealt with the ten major industrial countries including Japan. (*Id.*, 1235-1236) The United States' current deficit with respect to the balance of payments is equally serious now as it was in 1971. (*Id.*, 1241) However, the situation in 1970 and 1971 is not analagous to today because of the quadrupling of oil prices that occurred in December, 1973. (*Id.*, 1242) The balance of payments is still a problem. However, the dimensions of the problem are different. (*Id.*,)

Inflation has a very definite relationship to devaluation of national currencies. Relative rates of inflation are a crucial factor. If a country is inflating at double the rate that other countries are inflating, that country will quickly become uncompetitive in international trade. (*Id.*, 1244)

There have been numerous discussions over the years in Washington with regard to ways to combat the trade deficit, including the suggestion of withdrawal of troops out of NATO. (*Id.*, 1246-1247) Also, there have been suggestions that foreign travel by citizens in the United States (including government officials) be restricted to prevent the expenditure of money in foreign countries. (*Id.*, 1247-1248) At one time the Department of Treasury proposed a travel tax, but it was not implemented. (*Id.*, 1248)

Bradfield is not an expert with respect to the refrigerant gas industry. (*Id.*, 1250-1251)

The surcharge was put into effect on August 16, 1971 and the rate of exchange in August of 1971 was 360. (*Id.*,

1253) In 1975 the rate of exchange was 305, which is a 15.28 drop in the exchange rate. (*Id.*, 1253-1254) If Daiflon was purchasing refrigerant gas from Japan in 1971 and had continued to purchase through 1975 it would have had to pay 15% more for that gas in 1975. (*Id.*, 1254)

The exchange rate does not "bounce around" it changes gradually. The rate is a rate which is in effect on a particular day. However, the chart utilized by Bradfield in connection with his testimony does not show day by day changes in the exchange rate, but rather reflects year-end figures and the rate could have changed markedly in the intervening time. (*Id.*,1255) In the preparation of his chart, Bradfield just connected year-end figures. (*Id.*, 1256) The charts are representative of the trend in the exchange rate for the yen and accurately show the increase costs that would be involved in importing products into the United States as a result of the exchange rate change. The International Monetary Fund publishes the data with respect to balance of payments monthly. The publication is called International Financial Statistics. However, the information on Bradfield's charts is shown on an annual basis. (*Id.*, 1258) The charts pertain only to Japan and the United States, the yen-dollar relationship. (*Id.*, 1259) The yen-dollar relationship was not the only consideration taken into account at the time of international meetings. (*Id.*, 1259)

One of the purposes of devaluation was to decrease foreign imports. (*Id.*, 1259-1260) Japanese imports decreased through 1975 and began increasing in 1976 through 1978 to their current large proportions. (*Id.*, 1260) Japanese imports today are greater than they were in 1972. (*Id.*,)

One of the documents reviewed by Bradfield in the preparation for his testimony was the Statistical Supplement to the Survey of Current Businesses" which shows foreign trade of the United States and the value of imports. (*Id.*, 1263) That survey shows that in 1970 the imports from Japan were $5,875,000,000, in 1971 they were

$7,258,000,000, in 1972 they were $9,664,000,000, and in 1974 $12,327,000,000. (*Id.*, 1264) Despite these increases the surcharge and devaluation decreased exports from Japan from what otherwise would have been with no surcharge. (*Id.*, 1265) The extent and effect of the change in surcharge and currency and exchange rates depends on the particular products being exported and its competitiveness against domestic products. (*Id.*, 1266) Bradfield did not study the paraticular effects of the surcharge and devaluation on the refrigerant gas business. (*Id.*, 1266) When Bradfield testified that in 1971 there was a 15% increase in the cost of importing products from Japan, that calculation pertained to every industry. (*Id.*, 1266)

Bradfield did not know when Daiflon established its plant. (*Id.*, 1270-1271) The extra cost of the exchange rate was only one factor among many with respect to an importer's cost of doing business. (*Id.*, 1271) Other factors would be the cost of labor in the United States, and this was not affected by the surcharge.(*Id.*,) Another factor would be the cost of materials that are purchased within the United States, and that was not directly affected by the surcharge and devaluation. The fact that purchasing power of the dollar has been devaluated by 15% in Japan does not necessarily mean that the overall cost to a company such as Daiflon would have increased 15%. Only the cost of importing the refrigerant gas would be increased. (*Id.*, 1273-1274) Bradfield was not aware that Daiflon did not purchase refrigerant gas from Japan during the time that the surcharge was imposed.

B. *James Hibdon, Ph.D (Cross examination)*

James E. Hibdon, Ph.D. ("Hibdon"), a professor of Economics at the University of Oklahoma, testified on behalf of defendants as an expert witness with respect to the pricing of products in the fluorocarbon industry over a period of time including the period 1969-1972. ("Excerpt

from Trial Proceedings, being Direct Examination of James E. Hibdon," 2-38) Upon cross examination Hibdon indicated that he read the depositions of Wright of DuPont, Ward of Pennwalt, Napoli of Union Carbide, O'Donnell of DuPont, Sorensen of Kaiser, Regan of Allied, Knofp of Racon. (Excerpt from Trial Proceedings, being Cross-Examination of James E. Hibdon Prior to Mid-Afternoon Recess, 1-2) He did not review the depositions of Frank Rose, Harold Gresham, Bernard Solon, R. B. Ward, Harold G. Palmer or Harry Lynn. (*Id.*, 2-3) The industry described by Hibdon in his testimony was the fluorocarbon industry and refrigerant gases comprise approximately 30 to 40% of that industry. (*Id.*, 3) The fluorocarbon industry also includes hairspray, anti-perspirant sprays, oven cleaners, and possibly paint, waxes and even perfume. (*Id.*,) The charts presented by Hibdon during the course of his testimony related to the entire fluorocarbon industry. (*Id.*, 3-4) The differences in the sales and distribution methods of the products other than refrigerant gas, and the differences in pricing are not reflected on Hibdon's charts. (*Id.*, 4) The charts show the market price in the entire industry. (*Id.*,) He did not prepare any charts with regard to the refrigerant gas market. (*Id.*, 4-5)

If in fact there was extreme stability in market shares between the defendant companies, there was intense competition in order to maintain those shares. (*Id.*, 5) If a particular employee or employees were prevented from competing for business with particular customers in order to maintain market shares, that may have some impact on competition. (*Id.*, 5-6) A firm in an industry such as the refrigerant gas industry, where there are only a few sellers, cannot act without considering what else is going on in that industry. (*Id.*, 15) If they are selling a homogeneous product and one of the firms raises its prices and the other firms do not follow, that firm will lose sales, and the more it raises its

price relative to the others, the more sales it will lose as a consequence. (*Id.*, 15-16) If there was a simultaneous price increase on the same hour it would be some evidence that there was collusion. (*Id.*, 16)

Hibdon's charts, which show an overcapacity during the years 1969 to 1972 in the overall fluorocarbon industry, are not helpful with respect to the refrigferant gas market. ("Excerpt from Trial Proceedings, being portion of Cross Examination of James E. Hibdon following Mid-Afternoon Recess," 5-6)

Companies can have reasons to collude or conspire other than with regard to prices alone. This assumes that the company increased or moved in the directions of increasing profits.. (*Id.*, 14) A company might make some concessions over a brief period of time in order to gain their objective over a longer period of time. (*Id.*, 14-15) The trend line on Hibdon's chart with respect to the relative price of fluorocarbons slopes down to the right because of inflation in the entire country. (*Id.*, 15) The only way that "relative prices" can be analyzed is to eliminate the effects of inflation. With no inflation element at all the prices would still decline in the overall fluorocarbon industry. (*Id.*, 15) Hibdon's charts show "average prices in the industry which are not identical to what actually happened in the refrigerant gas market." (*Id.*, 15-16) The prices shown were "average annual prices". There are no transaction prices. (*Id.*, 16) Hibdon did not have factual knowledge of what went on in each segment of the total market. (*Id.*,) Where there is high market concentration by a small number of firms, effects can range all the way from an intense degree of competition to collusion. (*Id.*, 17) Hibdon considers six manufacturers to be a small number of sellers in a market, and that four firm concentration of over 90% is considered to be high concentration. (*Id.*, 17)

At page 171 of Hibdon's book *Price and Welfare Theory*, it is stated that in a purely competitive market the

individual buyer or seller has no market control. It is further stated that two conditions eliminate potential control possibilities: homogeneous or standardized products and a large number of buyers and sellers, so that the amount bought or sold by one buyer or seller is only a small fraction of the total. (*Id.*, 18) Hibdon still believes this to be correct.

Collusion on price is most likely in cases of oligopoly. (*Id.*, 19) Oligopoly means that there are just a few sellers. The more sellers there are the less likely they are to be able to collude. (*Id.*, 19)

Entry barriers are those things which prevent a new firm from coming into an industry even though it may want to. Examples are patents, high capital costs, and small markets characterized by economies of size. (*Id.*, 21)

A monopoly exists when there is only one firm in the industry; there cannot be a monopoly where there is more than one seller. (*Id.*, 22) High prices and monopoly profits earned by manufacturers in a particular market can attract a new firm to enter the market unless there are barriers to entry. (*Id.*, 25) The literature in economics is in conflict with respect to whether a firm with monopoly power has the incentive to lower prices below a competitor's costs in order to drive that competitor out of business. (*Id.*, 25) However, that seems to have occurred. That is costly in terms of affecting net revenue and also in terms of possible legal action.

Referring to Pl. Exh. No. 1065, a DuPont trade report (see Exhibit "D" to this Narrative Statement), Hibdon reviewed the statement of the DuPont salesman that his customer in Birmingham was "passing on the 13% discount which we offered in order to combat the Japanese refrigerant." This would not necessarily indicate predatory pricing. (*Id.*, 30) What the wholesaler is doing is trying to meet or to compete on a price basis with Daiflon. (*Id.*,) Hibdon then testified:

MR. CRAWFORD: I believe, your Honor, the

question was if the 13% decrease had been instituted by DuPont to combat and drive Daiflon out of the market, wouldn't that be predatory pricing?

A. (The Witness) If the facts are as you say, but I cannot conceive that they would be.

Q. (By Mr. Crawford) Because you can't conceive of DuPont doing that?

A. That's exactly right, not getting at reducing prices, but the costs are extremely high, as I mentioned before, for that sort of activity. It wouldn't be worth it." (*Id.*, 31)

One of the documents reviewed by Hibdon in preparation of his testimony was a survey of the fluorocarbon/refrigerant market and recommendations for action prepared for Union Carbide. (*Id.*, 32) That report provided Hibdon with information about potential changes in the capacity of the fluorocarbon industry, what was going on, and new technology being put into place. (*Id.*, 38) It is stated there that "head to head confrontation with DuPont should be avoided on a price basis. However, efforts should continue toward sharing customer requirements with them." (*Id.*, 41) Hibdon states that this suggests that other companies are not as efficient as DuPont, and do not want to try to undersell DuPont because they are not sure that that can be accomplished. Accordingly, they want to "get what business they can". (*Id.*, 41-42) That would not indicate that DuPont may have monopoly power. (*Id.*, 42) DuPont lost its monopoly power in 1949 when it lost its patent. (*Id.*,) That conclusion is based upon terms of one person being a monopoly, which is Hibdon's "standard definition of a monopoly". (*Id.*,)

C *Gerry McHugh and John Wilson*

Through the testimony of these witnesses (McHugh is a computer programmer for Union Carbide and Wilson is an employee of Arthur Young) defendants introduced

computer print-outs reflecting, on a line item basis, each sale made by Daiflon, by state, prior to the loss of its customers. The print-out showed over 13,000 line item transactions by Daiflon in Puerto Rico and the following states: Texas, Alabama, Illinois, Oklahoma, Indiana, Mississippi, Missouri, North Carolina, Minnesota, Kansas, Georgia, Florida, Iowa, Louisiana, Ohio, Tennessee, South Dakota, South Carolina, Colorado, Nebraska, Arkansas, Kentucky, Washington, D.C., Virginia, Massachusetts, Wisconsin, Nevada, Michigan, North Dakota and Connecticut. (Def. Exh. Nos. 84 and 85)

III. DAIFLON'S REBUTTAL EVIDENCE.

For rebuttal, Daiflon offered additional testimony from Richard E. Carter.

A. *Direct Examination*

Carter did not have any conversation with Jim Robertson with rexpect to the filing of a suit against defendants and settling it for a half a million dollars plus legal fees. (Carter, 1281-1282) Nor did Carter have any conversation with Robertson or anyone else with respect to having defendants give Daiflon a particular marketing area. (*Id.,*) Furthermore, Carter had not seen Def. Exh. No. 5 prior to the taking of his deposition on November 9, 1977.

In early 1972 Carter had one or two telephone conversations and a meeting with Lewis Paul of International Plastics Incorporated at Galveston, Texas about building a refrigerant manufacturing facility in Freeport, Texas. Mr. Paul cam down to Galveston "to attempt to make a joint venture of it". (*Id.,* 1284-1285) At no time during either the telephone conversations or the meeting in Galveston with Mr. Paul did Carter tell him that he was out to wreck the market. (*Id.,* 1287)

Carter testified with respect to the computer print-outs introduced by defendants relating to Daiflon's sales. (*Id.*, 1288; Def. Exh. Nos. 84-86) Carter compared Daiflon invoices against information set forth on Def. Exh. No. 86. (*Id.*, 1289) Carter found a number of errors in the print-outs relating to poundage, weight and voided tickets. (*Id.*, 1289-1290)

B. *Cross Examination*

Robertson was Carter's accountant from 1967 through 1972. (*Id.*, 1291) He has continued doing work for Carter subsequent to October, 1972. (*Id.*, 1292) Robertson also served as a management advisor for Carter. (*Id.*,) During the period 1967 to 1972 Robertson prepared tax returns and audits for Carter. (*Id.*, 1294) Robertson was familiar with Carter's business, and in May or June of 1972 Carter asked him to come to Galveston as an employee. He remained employed by Daiflon through the summer of 1972. (*Id.*, 1294-1295) During that time Carter and Robertson talked about building a manufacturing facility for Daiflon. (*Id.*, 1295)

Carter did not have any conversation with Robertson prior to Robertson's preparation of Def. Exh. No. 5, which purportedly relates to the settlement of a lawsuit. (*Id.*, 1299-1300) Carter did not have any conversation with Robertson about stabilizing or fixing prices. (*Id.*, 1300)

Daiflon's busiess consisted of approximately two-thirds R-22 and one-third R-12. (*Id.*, 1310) Daiflon's total poundage sold was approximately 3.1 million pounds. (*Id.*, 1311)

Carter had not seen Def. Exh. No. 103 prior to the time that his deposition was taken in November 1977.

Carter knew that agreements to stabilize prices and market or territorial allocations were illegal under the Antitrust Laws — that "These were things that were hap-

pening to us * * * Everybody in our company was talking about that at that time." (*Id.*, 1301-1303)

Respectfully submitted,
B. HAYDEN CRAWFORD
JOEL L. WOHLGEMUTH
FRANK GREGORY

By: B. Hayden Crawford
Crawford & Jackson
1714 First National Bank Bldg.
Tulsa, Oklahoma 74103

By: Joel L. Wohlgemuth
Prichard, Norman & Wohlgemuth
1100 Philtower Building
Tulsa, Oklahoma 74103

By: Frank Gregory
4107 South 72nd East Avenue
Tulsa, Oklahoma 74145

Attorneys for the Petitioner,
Daiflon, Inc.

[Attachments deleted in printing.]

APPENDIX I

No. 79-1459

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAIFLON, INC.,
Petitioner,

THE HONORABLE LUTHER BOHANON,
Judge of the United States
District Court for the Western
District of Oklahoma, et al.,
Respondents.

RESPONDENTS' NARRATIVE STATEMENT OF FACTS

This statement is submitted by respondents[1] pursuant to this Court's order of August 10, 1979. Our understanding of that order, confirmed by its reference to Rule 10(d) of the Federal Rules of Appellate Procedure, is that the Court desires a statement explaining how the issues discussed in the petition for a writ of mandamus and/or prohibition arose and reciting the evidence relating to those issues. Accordingly, this statement contains little that bears on the basic, threshold issue in this proceeding—which is whether the petition should be denied because it is an impermissible attempt to obtain, by means of this extraordinary proceeding, review of an unappealable order.

---

[1]/For the purpose of this statement, "respondents" are the defendants in the trial court—Allied Chemical Corporation, E.I. du Pont de Nemours & Company, Kaiser Aluminum & Chemical Sales, Inc., Kaiser Aluminum & Chemical Corporation, Pennwalt Corporation, Racon Incorporated and Union Carbide Corporation. The nominal respondant, The Honorable Luther Bohanon, informed this Court by letter dated May 30, 1979, that he will not make any appearance in this matter.

Whether this Court presently has jurisdiction "to judge the exercise of discretion" (Order, p. 1) represented by the district court's new trial order is basically a legal question, which has been fully briefed by the parties. As the cases discussed in respondents' answer to the petition make clear, this Court has adhered steadfastly to the settled rule that extraordinary relief is never available where the issue is simply whether the trial court abused its discretion, or erred in its resolution of issues that it had jurisdiction to resolve. Answer, pp. 10—14.

Daiflon has conceded in its petition that respondents' motion for a new trial was timely, and that the district court, therefore had jurisdiction to consider the motion. Pet. 9. In addition, although Daiflon challenges the merits of the district court's decision ordering a new trial, it does not contend that the excessiveness of a jury verdict or the lack of a fair trial—the bases for the trial court's decision here—are insufficient as a matter of law to justify the award of a new trial. Respondents submit that, as a consequence, the extraordinary relief being sought in this proceeding must be denied. But it also is clear, in any event, that there was ample—indeed, overwhelming—justification here for vacating the judgment.

The reasons advanced by the district court in ordering a new trial were that the damages found by the jury were grossly excessive and that respondents did not receive a fair trial. The balance of this statement will explain how those issues arose and set forth the facts relating to them. In the present posture of this matter, the merits of Daiflon's antitrust claims are not before this Court and this statement consequently will not address issues relating to liability. Nevertheless, respondents believe that there was a complete failure of proof on the liability issues in this case, and we respectfully direct the Court's attention to the statement of facts and legal argumentation contained in the memoranda filed in support of respondents'

post-trial motions in the district court.[2]/

II.
EVIDENCE RELATING TO THE DISTRICT COURT'S DETERMINATION THAT THE DAMAGE AWARD WAS EXCESSIVE

Daiflon has asserted in its petition (e.g., Pet. 31—32) and in its reply memorandum (e.g., Reply 15) that the district court abused its discretion in concluding that the damages found by the jury were grossly excessive because Daiflon's evidence of damages was "uncontroverted" and "unrefuted." This assertion suffers from two glaring defects. The first is that it ignores the abundant evidence at trial as to Daiflon's high costs and operating inefficiencies and as to the governmental action that Daiflon acknowledged was "disastrous" for it. A second related defect is that Daiflon had the burden of proof with respect to damages, and the simple fact is that Daiflon's damage theory fell of its own weight.

(i) Evidence Relating to Daiflon's Costs and Operating Problems

The evidence at trial showed that, from the outset, Daiflon was beset by a host of unique cost and operating problems that were not faced by any of the respondents—the six United States manufacturers of refrigerant gas. Many of these problems stemmed from the fact that the principals of Daiflon made a conscious business decision in 1969 to import refrigerant gas in bulk from a supplier in Japan, and then to repackage and resell that gas to wholesalers and end users in the United States. Carter, Tr. 147. Throughout the period of its existence, which extended from 1969 through 1972, Daiflon remain-

---

[2]/These memoranda are appended to the Answer to Petition for Writ of Mandamus and/or Writ of Prohibition filed by respondents in this Court. *See especially* Respondents' N.O.V. Memo, pp. 5—44

ed dependent upon Japanese imports.[3]/ Carter, Tr. 148.

The importing, as well as the repackaging, aspects of Daiflon's operations entailed numerous competitive disadvantages for the company.[4]/ One of Daiflon's most persistent problems was the problems of shortages. Mr. Carter acknowledges that in 1969 and 1970 Daiflon's most persistent problems was the problems of shortages. Mr. Carter acknowledged that in 1969 and 1970 Daiflon's Japanese supplier did not deliver adequate amounts of refrigerant gas. Carter Tr. 148, 155. According to Mr. Carter, Daiflon could have sold substantially more refrigerant gas during that period had it been able to

---

[3]/Mr. Carter, the President of Daiflon, testified that at no time during Daiflon's existence did it ask any of the respondents to sell it any grade of refrigerant gas. Carter, Tr. 148, 343. Mr. Carter attempted to explain this by pointing out that he considered respondents to be competitors of Daiflon. Carter, Tr. 343.

[4]/These competitive disadvantages apparently came as something of a surprise to those responsible for Daiflon's operations. Mr. Carter admitted at trial that he and his colleagues "didn't conduct studies of the marketplace" to assess the feasibility of Daiflon's entering the refrigerant gas business as a reseller of imported Japanese refrigerant gas. Carter, Tr. 148. Mr. Carter testified that his impression, at the time he organized Daiflon, was that there was a substantial demand in the United States for refrigerant gas that was not being met by respondents and that he "assumed" that the production and sale of refrigerant gas was a profitable business. Carter, Tr. 104.

This lack of marketing information continued to plague Daiflon throughout its existence. Mr. Carter testified that, even after Daiflon had been in operation for three years, Daiflon was unable to provide its Japanese supplier, Daikin Kogyo, with information that Daikin had requested concerning the marketing of refrigerant gas in the United States. Carter, Tr. 149-150. In fact, Mr. Carter stated that the Japanese repeatedly were called upon to provide Daiflon with United States marketing information because Daiflon found such information "very, very difficult to obtain." Carter, Tr. 150.

convince its Japanese supplier to increase its allotment.[5]/ Carter, Tr. 155, 161—162.

But even during 1969 and 1970, when Daiflon was able to sell all of the refrigerant gas it obtained from Japan, Daiflon did not realize a profit on its refrigerant gas operations. Carter, Tr. 275—285. The reason was that, as Daiflon's principals acknowledged, Daiflon's costs were substantially higher than those of its competitors—even before the United States Government imposed a 10 percent surcharge on Japanese imports in August 1971. Carter, Tr. 154—155; McDonald, Tr. 586—587[6]/ The most significant of these added costs were attributable to the fact that Daiflon, unlike the respondents, was not itself a manufacturer, but was buying its gas from a supplier several thousand miles from the United States.

A clear picture of Daiflon's economic hopelessness is provided by Plaintiff's Amended Answer to Interrogatory No. 2 of Defendants' Second Set of Interrogatories (Def. Exh. No. 67), which shows detailed cost and profit/loss breakdowns of Daiflon's operations. For the Court's convenience, this table is reproduced overleaf in its entirety. It shows, as a bottom-line proposition, that Daiflon was losing about 16 cents per pound on every pound of refrigerant 22 it sold at 70 cents per pound and on every

---

[5]/A portion of the deposition testimony of Mr. Lewis A. Paul, president of International Plastics, a repackager of refrigerant gas, provided further insight into Daiflon's supply problems. According to Mr. Paul, Daiflon "had a rather unstable supply of refrigerant gas. *** [T]he Japanese were exporting (refrigerant gas) on a surge basis. When they had an over-abundance, they would ship a reasonable quantity of material out. And in my opinion, it was an unstable basis." Paul, Deposition 95—96.

[6]/Mr. R.D. McDonald served as Daiflon's secretary and treasurer, and beginning in early 1971 had a 50 percent ownership interest in the company. McDonald, Tr. 523, 525.

pound of refrigerant 12 it sold at 47 cents per pound.[7]/ The cover sheet to this exhibit contains the sworn statement by Daiflon that:

> "The cost information set forth on the attached schedule, while specifically prepared for the eight months ended October 31, 1971, is representative of Daiflon's costs for the years 1970, 1971, and 1972."

A graphic picture of the burdens imposed by Daiflon's long and uncertain supply chain was provided by the testimony of Mr. Carter. Mr. Carter explained that once refrigerant gas had been produced by Daikin Kogyo in Japan, it was placed in one and two ton storage containers in Osaka. Carter, Tr. 151. The refrigerant gas ordered by Daiflon was transported in these storage containers from Osaka to the ports of Kobe or Yokohama, where they were held until they could be put on ships bound for the United States. Carter, Tr. 152. The ships docked at the Houston—Galveston port, where the refrigerant gas was removed, and then was transported prior to 1971 by rail or truck to Tulsa, Oklahoma. Carter, Tr. 153. The refrigerant gas was removed from the storage containers in Tulsa, and was repackaged into small cylinders that could be resold either to wholesalers or end users in the United States. Carter, Tr. 154. It was not until 1970 that Daiflon opened a storage and repackaging facility in Galveston, thereby eliminating the need to transport all of the refrigerant gas to Tulsa. Carter, Tr. 153.[8]/

Each of these steps entailed substantial costs that did not confront Daiflon's competitors in the United

---

[7]/ As we show below (p.29, n. 21), Daiflon's damage theory was posited on a market price *lower* than those reflected in this exhibit. Thus, under Daiflon's own damage theory, its losses would have been even greater than those shown on the exhibit.

[8]/ In the Galveston facility, the refrigerant gas was not pumped directly into small cylinders, but was pumped instead into large storage tanks, from which the small cylinders were filled. Carter, Tr. 154.

States. In addition, Daiflon could not order refrigerant gas directly from Daikin Kogyo but had to place its orders through a company in Hutchinson, Kansas, that had obtained an exclusive license to import Daikin's refrigerant into the United States. Carter, Tr. 170. This company charged Daiflon a fee amounting to 5 percent of the price Daiflon paid for the refrigerant gas that it received. Carter, Tr. 170—171. Daiflon also was required to pay customs and import duties to the United States Government. *Ibid.* During 1969 and 1970, these duties were set by law at 6 percent ad valorem. Carter, Tr. 177.

Thus, even without any unforeseen disruptions in its operations, Daiflon's high costs placed it at a distinct competitive disadvantage. But the evidence showed that disruptions occurred with some regularity, having an increasingly adverse impact on the company. Mr. Carter testified, for example, that Daiflon was unable at various times to obtain a sufficient number of ocean-going containers to meets its needs. Carter, Tr. 160—164. Daiflon also was unable periodically to locate sufficient cargo space on ships bound for the Gulf Coast of the United States, which resulted in Daiflon's not having enough refrigerant gas to fill orders that had been placed.[9]/ Carter, Tr. 160, 173—174. In addition, when Daiflon was in business, there were dock strikes in the United States that prevented it from receiving shipments of refrigerant

---

[9]/Mr. Carter testified that the shortage of cargo space on ships going from Japan to the Gulf Coast caused him to investigate the possibility of using ports on the West Coast. Although there was more ship traffic between the West Coast and Japan than between the Gulf Coast and Japan, Mr. Carter finally decided not to exercise this option. The reason, according to Mr. Carter, was that overland freight rates between the West Coast and Houston or Galveston were prohibitively high. Carter, Tr. 169.

gas from its Japanese supplier. Carter, Tr. 166—168. Additional disruptions were caused, according to Mr. Carter, by a dispute that developed between Daiflon and its Japanese supplier concerning letters of credit that Daiflon was using and by improper handling of empty ocean-going containers that we were being returned to Japan for refilling. Carter, Tr. 164—166, 169—170, 172—174.

Although many of the problems and costs just discussed were an unavoidable consequence of the decision to import refrigerant gas from Japan, there was testimony showing that other aspects of Daiflon's operations that proved to be harmful to the company could have been avoided. For example, Daiflon entered the refrigerant gas business at about the time returnable Carter, Tr. 230—233; Adams, Tr. 649—652. Disposable cylinders had several advantages over returnable cylinders, including the fact that they were lighter and able cylinders, including the fact that they were lighter and less expensive to purchase than returnable cylinders, they did not have to be stored and returned to the refrigerant manufacturer, and no deposit was required to insure that the cylinders would be returned. Carter, Tr. 233; Def. Exh. No. 20; Stone, Deposition 22—23. Mr. Adams, Daiflon's sales manager, said that, in his opinion, Daiflon had to price its refrigerant gas approximately 5 cents per pound below the lowest price being charged by the United States manufacturers (all of which were using disposable cylinders while Daiflon was in business) in order to compensate for Daiflon's decision to offer only returnable cylinders. Adams, Tr. 649—652; Carter, Tr. 236. Indeed, Mr. Adams conceded that a significant number of potential customers refused to purchase refrigerant gas from Daiflon because of the handling costs and deposits associated with Daiflon's use of returnable cylinders.

Adams, Tr. 649—652, 675; *see also* Carter, Tr. 232.[10]/

Daiflon also suffered because the company lacked warehouse facilities near its customers' places of business. Carter, Tr. 227—230; *see also* Adams, Tr. 679—680. This meant, among other things, that Daiflon was not able to fill emergency orders for refrigerant gas and incurred higher freight costs in the United States than were being incurred by respondents or by respondents' customers, wholesalers of refrigerant gas to the air conditioning and refrigeration trade. Carter, Tr. 228. Although those responsible for Daiflon's operations apparently recognized the seriousness of this problem,[11]/ no effort was made to alleviate it during the period of Daiflon's existence. Carter, Tr. 299—230, 337.

In sum, the evidence showed that Daiflon suffered

---

[10]/Mr. Adams' opinion in this regard undoubtedly was influenced by communications he received from Daiflon's distributors. For example, Mr. J. T. Fraker informed Mr. Adams in a letter dated July 7, 1972, that "[w]e regret to inform you that we are daily facing objections from many-many customers who are unwilling to buy our refrigerant because of the necessary drum deposit." Mr. Fraker went on to say that "[w]e are confident this problem is being presented to you from numerous other distributors all of whom would greatly prefer your refrigerant shipped in non-returnable-throw-away type drums." The letter ended with Mr. Fraker informing Mr. Adams that "I am confident we would double our volume immediately if we could get shipment from you in throw-away type drums." Def. Exh. No. 20.

When asked at trial whether any action had been taken to solve the problems described by Mr. Fraker, Mr. Carter replied: "We did not follow that suggestion, no." Carter, Tr. 235.

[11]/For example, on August 13, 1971, only two days before the United States imposed a 10 percent surcharge on Japanese imports, Mr. Carter informed two of Daiflon's area sales representatives that "I believe, No. 1, to get the job done we must warehouse product near the sales point for service and to eliminate freight cost where possible." Def. Exh. No. 31; Carter, Tr. 288—230.

from its inception from a series of operating problems[12]/ and cost disadvantages that, in combination, prevented it ever from realizing a profit and threatened its viability. The evidence also showed that many of these problems were an inevitable by-product of a certain laxness, or naivete, on the part of those responsible for Daiflon's operations—and in particular, on the part of Mr. Carter. *See* p. 5, n.4 *supra*. In addition, according to Mr. Lewis Paul, the president of International Plastics, who had studied Daiflon's operations and then had met with Mr. Carter in the spring of 1971, Mr. Carter's "marketing policies were no policies at all." Paul, Deposition 141. Mr. Paul went on to say that he had concluded, as a result of his meeting with Mr. Carter, that Mr. Carter:

> "Didn't know (refrigerant gas) to begin with, that he was a hell of a good salesman, [and] that his marketing policy absolutely was doomed to failure * * *." Paul, Deposition 143.

A slightly different perspective on Daiflon's operating problems was provided by the deposition testimony of Mr. Drexel Daily that was read to the jury. Mr. Daily was the vice president and general manager of Wittichen Supply Company, a wholesaler of refrigeration parts and supplies, including refrigerant gas. Daily, Deposition 11. Mr. Daily had testified that Daiflon had offered to sell refrigerant gas to some of his customers (comprised primarily of firms installing and servicing

---

[12]/ In addition to the operating problems already discussed, there was evidence that Daiflon was affected adversely by its failure to offer its customers cylinders having two way valves, (Carter, Tr. 237—239), by a persistent problem with refrigerant gas leaking out of inadequately sealed cylinders (Carter, Tr. 248—251), and by its inability to solve a nagging problem of refrigerant contamination (e.g., Carter, Tr. 240). Mr. Carter admitted that users of refrigerant gas would be especially concerned about the latter problem because "an air-conditioning or refrigeration system [can] be completely ruined if contaminated refrigerant gas is used in it * * *." Carter, Tr. 241.

refrigeration and air conditioning equipment) at prices substantially below Wittichen's prices. Daily Deposition 69—70. But Daily concluded that, because of Daiflon's many operating problems, there was no reason for Wittichen to be concerned about the competition from Daiflon. As Mr. Daily explained the situation:

> "I first looked at what we had to offer the customers, and what Daiflon had to offer. And I saw that we had merchandise in stock, and any time they needed it it was there. * * *
>
> "And * * * we had the best technical men in our area that serves the trade. When they come in and buy this refrigerant we can advise them on the problems that they are having on the systems, such as why is the head pressure too high when I add this refrigerant***.
>
> "Then we have emergency delivery trucks. * * * Any man in town that needs refrigerant at any time during the day, if he calls in and we are as much as an hour late in getting there, we've got big problems. And he depends on us, and this is important * * * to them. * * * And if they had to wait, that cost was far beyond any difference in (the price of the) refrigerant. * * *
>
> "Then all of our customers I gave night phone numbers to. These phone numbers meant thay could get us twenty-four hours a day, seven days a week. And (Daiflon) could not offer any of this.
>
> * * * *
>
> "Now, I have found that when you take care of a man at midnight on a breakdown, such as a freezer, and he had several thousand dollars worth of food warming up, he appreciates—you get him out of a real jam. And we were able to do that, not a few times, but we have made thousands of emergency calls down at the office. Then if you helped them at night, he's anxious to continue that relationship, and

he will buy the refrigerant from you the next day.

"And then we had a full line of refrigerant. I notice that Daiflon had basically two, 12 and 22. * * *

* * * *

"The average customer * * * was going to be in our place picking up other parts. We carry the large valves, dryers, drainers, anything else he needs he comes in our place anyway. He doesn't know when he is going to give out of refrigerant so it is convenient for him to pick it up at that time. In fact, we carry the largest stock in town. To give you an idea, our catalogue is thirty-six inches wide, and about three or four sheets in this catalogue is devoted to refrigerants. So we have an awful lot to offer him that [Daiflon] didn't.

* * * *

"Then with the men we had to back it up, and we had a product they were familiar with, and, of course, the fact it was an American product did mean something to quite a few of them.

* * * *

"When Daiflon came to the credit part of it in the billing, they were going to bill direct. And that is one of the two biggest headaches that a wholesaler has, but yet one of the biggest assets for our customers. Because he can come in and talk with me, or the local credit manager, and if he needs more refrigerant than his credit limits for that particular day, I can say, 'Okay, pay me tomorrow, and we will follow the job up.' And this is invaluable, because it gets his job going on.

The other big function of the wholesaler is stocking this material, which is, again, a real expensive proposition. This, of course, would be then passed on to my customer that would do the buying. I knew that a lot of them were not in position to do the stocking.

"For instance, a sizeable portion of my business is to the independent service man. He operates one truck, and maybe has a helper. His warehouse facilities is basically his truck. So with him, I could forget him. I figured that with the proposition [Daiflon] had, he would have to buy six hundred pounds of refrigerant at a time, and this he couldn't do. * * *

* * * *

"And I saw that some of the customers were having trouble keeping up with the empty cylinders. They had to pay a $10.00 deposit for [Daiflon's], and ours were disposable containers. They could throw them away. * * *" Daily, Deposition 76—84.[13]/

Thus, the evidence at trial provided ample justification for Mr. Paul's conclusion that Daiflon was "doomed to failure." Paul, Deposition 143. Daiflon was burdened from the outset with numerous operating problems—including (1) an unstable supply of refrigerant gas, which sometimes prevented it from filling orders that had been placed; (2) delays in receiving needed supplies of refrigerant gas from Japan; (3) the lack of warehouse facilities, which increased its freight costs, prevented it from filling orders expeditiously or providing emergency service to its customers, and resulted in its having to establish a minimum order level for refrigerant gas that exceeded the needs of many potential customers; and (4) the use of returnable cylinders, despite customer resistance.

---

[13]/Mr. J. F. Stone, an employee of Natkin Service Company, engaged in the service and installation of air conditioning and refrigeration equipment, gave similar reasons in explaining why his company stopped purchasing refrigerant gas from Daiflon despite Daiflon's low price. Stone, Deposition 21—23.

(ii) Evidence Relating to the Impact of Adverse Governmental Action

The evidence showed that, despite these problems, as of early August 1971 the Daiflon management intended to remain in business. For example, in April 1971 Mr. Carter wrote an encouraging letter to the Natkin Service Company, informing Natkin's president that "1971 should be a good year for us, as we are ready to supply a sales department for the first time since our beginning" and "[w]e have our past problems defeated ***". Def. Exh. No. 30. Approximately three months later, on August 5, 1971, Mr. Carter wrote to Mr. Aaron York of the Schilling-Chilling Company that—

> "The shipping strike is just around the corner, but this time, we are prepared—our inventory is now 1,044,500 pounds with two more shipments enroute.
>
> * * * *
>
> "The battle has been long, but we are winning. * * *" Def. Exh. No. 36

The day after the letter to Mr. York, Daiflon placed an order for an additional 44,000 pounds of refrigerant with its supplier in Japan. Carter, Tr. 223—225; Def. Exh. No. 18. One week later, on August 13, 1971. Mr. Carter wrote to two of Daiflon's area sales representatives to promote Daiflon's "National Trade Price Program" for 1971 and attempt to interest them in becoming involved in "a type of super distributor set-up (for Daiflon refrigerant) in Alabama and Mississippi * * *." Def. Exh. No. 31.

Despite these encouraging signs at the beginning of August 1971, the situation changed drastically in mid-August. Carter, Tr. 176—177. At that time, Daiflon's management began the process of liquidating Daiflon's operations—apparently under orders from The United States National Bank in Galveston, with which Daiflon had a substantial line of credit. McDonald, Tr. 541. All sales of refrigerant gas made by Daiflon after August 15,

1971, were out of inventory it had accumulated prior to that time. Carter, Tr. 197, 214—215. After August 15, 1971, Daiflon never imported any refrigerant gas. Carter, Tr. 176, 197; McDonald Tr. 585.

The evidence at trial left no doubt as to the cause of these events. On August 15, 1971, the President of the United States imposed a 10 percent surcharge on all imports from Japan and other countries. Carter, Tr. 176—177; Def. Exh. No. 6. This surcharge remained in effect until December 1971, when it was replaced by new exchange rates involving the dollar, the Japanese yen and other currencies. Bradfield, Tr. 28. As of December 15, 1971, the devaluation of the dollar as against the yen had the effect of increasing by some 17 percent—as measured against the exchange rate prior to August 15, 1971—the cost of imported Japanese goods, including refrigerant gas. Bradfield, Tr. 28. By July 1973, further changes in the dollar-yen exchange rate had resulted in an additional increase of 10 percent in the cost of imported Japanese products. Bradfield, Tr. 30

Mr. Michael Bradfield, who participated personally in the decision to impose the surcharge on Japanese imports as a senior staff member of the United States Treasury Department, testified that the surcharge was imposed to correct a critical trade imbalance that had developed by mid-1971 between the United States and its trading partners. Bradfield, Tr. 19—20. Mr. Bradfield explained that this country's balance of payments deficit with Japan presented an especially serious problem—both because it stemmed from a fundamental currency misalignment, which could be corrected only by decisive action by the United States Government, and because of its size.[14]/ Bradfield, Tr. 18—19. Mr. Bradfield also

---

[14]/"[I]n 1971, the deficit, the U.S. Balance of Trade Deficit with Japan was larger than the U.S. Balance of Payments Deficit with the whole world." Bradfield, Tr. 1235.

testified that the primary goal of the surcharge and of the subsequent devaluation of the dollar as against the yen was to make it more difficult to import goods from Japan while making products manufactured in the United States more attractive, in terms of their cost, in international markets—and particularly in Japan. Bradfield, Tr. 30—31, 38—39.

Finally, Mr. Bradfield testified that the United States officials responsible for the surcharge and the devaluation understood that United States companies dependent on Japanese imports would be severely disadvantaged, and might be put out of business, by the surcharge and devaluation. Bradfield, TR. 36—37. But Mr. Bradfield explained that a policy decision was made to proceed because of a blief that the benefits to the United State generally would outweight the injury to individual importing firms. Bradfild, Tr. 36, 38—39.

The import surcharge proved to be fatal to Daiflon. Mr. Carter admitted at trial that he had not foreseen the possibility that a surcharge would be imposed,[15]/ but both he and The United States National Bank in Galveston were quick to grasp its implications so far as Daiflon was concerned. As already noted, the bank ordered Daiflon to begin an "orderly liquidation" of its operations shortly after the surcharge had been imposed. McDonald, Tr. 537—538. And in September 1971, Mr. Carter wrote to

---

[15]/The failure of Daiflon's management to anticipate the surcharge and subsequent currency devaluation is confirmed by the following exchange:

"Q. Now, this surcharge came as a surprise to you, did it not?

"A. It did to me, yes.

"Q. When you were considering the possibility of going into an importing business, which I guess was in '68 or '69, did you consider the possibility of this type of surcharge?

"A. No, we would not. We had no way to anticipate this." Carter, Tr. 177.

Daikin Kogyo of the "disastrous" impact the surcharge had had on Daiflon:

> "Our business is very unsettled, since Mr. Nixon's announcement on the wage and price freeze. And, most important, the 10% surcharge on imports which, of course, has a disastrous effect on a business of our nature. * * *" Def. Exh. No. 9

Mr. Carter recognized in the same letter that further importation of refrigerant gas from Japan was not feasible in view of the surcharge:

> "Our competition has become very severe since the announcement of the 10% tax, which, of course, is a cost increase to us which, I do not believe, can be absorbed by either Daikin or ourselves." *Ibid.*

Mr. Carter also recognized that the devaluation of the dollar as against the yen, which occured in December 1971, simply compounded the hopelessness of Daiflon's situation. Mr. Carter was asked, for example, whether he had concluded that the Japanese yen reevaluation—which in December 1971 increased Daiflon's costs by an additional 7 percent over the surcharge level—would have "prevented you from making any profit in an importing business." Carter, Tr. 217—218. Mr. Carter replied, "It would have, if we would have continued, yes, sir." Carter, Tr. 218.

(iii) Evidence Relating to Daiflon's Damage Theory

Daiflon informed respondents prior to trial that its claim for damages was based exclusively on the fair market value of its allegedly destroyed business, as calculated by Dr. Benton Gup. The theory that Dr. Gup had used in computing Daiflon's damages, as well as the particulars of the claim, were set out in Daiflon's Supplemental Response to Defendants' Third Set of Inter-

rogatories, filed in July 1977. Mr. Richard Carter confirmed during his deposition in November 1977 that these computations were the sole basis of Daiflon's damage claim. Carter, Deposition 13. Mr. Carter reaffirmed that deposition testimony at trial. Carter, Tr. 274—275.

In performing his analysis, Dr. Gup used a computer program that purportedly simulated the future performance of the refrigerant gas industry. Gup, Tr. 949, 951. But rather than attempting to project a specific growth rate for the refrigerant gas market, Daiflon's market share, and so forth, Dr. Gup fed a range of values into the computer—which he labelled "minimum," "most likely" and "maximum"—from which the computer could select.[18]/ As explained by Dr. Gup on direct examination:

> "Now, what this statistical technique does, the computer calculates thousands and thousands of combinations of these things, randomly selecting from each one of those (assumed values), and by randomly selecting, I mean it's not clear when the computer selects, whether it will be the high end, low end, high end or low end, and when it does so, 500 times that was run on the computer, and that comes out to something like 6,000 or more calculations of your total.
>
> "When it did so, it came up with a range of estimates, and so the range of estimates [for Daiflon's value] ran from as low at [$610,000] to as high as [$12,000,000]." Gup. Tr. 952—953.

Dr. Gup also testified on direct that, on the basis of the computer's calculations, the "most likely" value for

---

[18]/These assumed values are shown on a chart entitled "Financial Model Used to Determine Value of Daiflon, Inc." Def. Exh. No. 79.

Daiflon was $2,960,000.[17]/ Gup, Tr. 954. But he went on to explain that, given the statistical techniques he had used, there were 68 chances out of 100 (even if all of the assumed numbers for market share and so forth that he had fed into the computer proved to be reasonable) that Daiflon's value would fall somewhere between $1,200,000 and $4,700,000. Gup, Tr. 954. Dr. Gup also admitted on cross-examination that there was substantially less than a 50 percent chance that his "most likely" value of $2,960,000 would be the appropriate value figure. Gup, Tr. 970.

Although Dr. Gup had informed the jury on direct examination that his assignment for Daiflon involved assessing Daiflon's likely future performance in the refrigerant gas industry (Gup, Tr. 949), his responses to questions asked on cross-examination revealed a studied ignorance on his part of the most important factors affecting that peformance. Dr. Gup testified on cross-examination, for example, that the price that Daiflon had to pay its Japanese supplier was not a factor in his assessment of Daiflon's worth. Gup, Tr. 1114. Similarly, Dr. Gup admitted that when he had performed his calculations, he had not taken into account—nor even known about—the import surcharge that had been imposed in August 1971. Gup, Tr. 1121. He also admitted that he had not taken into account, and had not known about, the

---

[17]/The computer program utilized by Dr. Gup was written and run by Mr. Fadel Iskander. Dr. Gup testified that he simply relied on Mr. Iskander, that he had not checked the program, and that he was not even competent to read the program. Gup, Tr. 962, 966, 1021, 1028. Mr. Iskander was not called as a witness by Daiflon.

As shown in respondents' New Trial Memo, pp. 10—12, and in the affidavit and letter appended to that Memo, plaintiffs' counsel was put on notice of the gross mathematical errors contained in the computer program, but counsel nevertheless continued to proffer to the jury this evidence which they knew or should have known was untrue.

devaluation of the dollar as against the yen in December 1971 and thereafter. Gup, Tr. 1121—1123.

As noted earlier, even Mr. Carter had realized by the end of August 1971 that Daiflon could not continue in business in view of the surcharge. And Mr. Carter also testified that the devaluation would have prevented Daiflon from realizing a profit had it continued to import refrigerant gas from Japan. Carter, Tr. 217—218. Yet, although Dr. Gup stated that he had spent between 40 and 50 hours with Mr. Carter in connection with his assignment for Daiflon (Gup, Tr. 965), the fact and significance of the surcharge and the subsequent devaluation of the dollar as against the yen apparently were never discussed. In short the single most important assumption underlying Dr. Gups testimony—that Daiflon "most likely" would have been able to continue, at least until 1982, to import refrigerant gas from Japan (Gup, Tr. 1065)—was irreconcilably in conflict with the testimony of Daiflon's witnesses who were familiar with its operations.

Dr. Gup also was forced to admit on cross-examination that the import surcharge, if taken into account, would have consumed the net income he had forecast as "most likely" for Daiflon—with some to spare. Dr. Gup had arrived at his assumed net income figure by hypothesizing, without any supporting evidence whatever, that Daiflon would have performed just as well as a broad spectrum of large American companies have performed in all of their operations.[18]/. Gup, Tr. 1103—1109.

---

[18]/The manner in which Dr. Gup approached the task of valuing Daiflon is typified by his explanation of how he had concluded that Daiflon "most likely" would have realized a net income of six percent on its sales. After Dr. Gup had testified that he had arrived at that conclusion by assuming that Daiflon would have performed as well as a broad spectrum of large American companies, some of them in the chemical business, have performed in all of their operations, the following exchange occurred:

(footnote cont'd)

On this assumption, according to Dr. Gup, Daiflon "most likely" would have realized a net income of six percent on its sales—or approximately 3.6 cents on each pound of refrigerant gas that Daiflon sold. Gup, Tr. 1123.

At the same time, however, Dr. Gup was forced to admit that, on the basis of Daiflon's answers to respondents' cost interrogatories, Daiflon's purchase price for Japanese gas (exclusive of importer's fees, freight in, customs and duty) was something over 38 cents per pound. Gup, Tr. 1124—1132. Thus, Dr. Gup also was forced to concede that the 10 percent import surcharge would have raised Daiflon's costs by 3.8 cents per pound, which meant that Daiflon would have ended up losing money on every pound of refrigerant gas that it sold.[19]/

Thus, even under Dr. Gup's assumptions,[20]/ the in-

(footnote cont'd)

Q. And the only points of similarity that you saw there were both are in the chemical business, that is, Daiflon and these other people, and both are industrial outfits?

"A. Yes.

"Q. And that's all?

"A. Yes."

Gup, Tr. 1109. In short, Dr. Gup completely ignored the fact, among others, that Daiflon was in the importing rather than the manufacturing business, and that its costs and methods of operation bore little relationship to those of respondents or of the other industrial firms whose performance he had used as the basis for his assumed six percent net income. He also ignored Daiflon's unique operating problems.

[19]/Dr. Gup also had to acknowledge, and did acknowledge, that the 17 percent devaluation of the dollar as against the yen in December 1971 would have increased Daiflon's losses on every pound of refrigerant gas that it sold. Gup, Tr. 1132—1133.

[20]/There were other assumptions—in addition to the assumed six percent net income figure for Daiflon—that also were impermissible. Thus Dr. Gup assumed that Daiflon "most likely" would have received a price of 60 cents per pound for its products because this was the price Dr. Gup assumed that respondents were charging pursuant to a

(footnote cont'd)

escapable conclusion was that Daiflon was without value as a going concern in view of the import surcharge and the devaluation of the dollar against the yen. Moreover, the refrigerant gas that Daiflon had in storage at the time the surcharge was imposed was a bottom-line liability.[21]/

The runaway nature of the jury's damage award also is confirmed by the evidence at trial as to how small a value was placed on Daiflon at the only time in the course of its existence—and that was before the import surcharge and the dollar devaluation—when it was subject to an objective valuation. Mr. R. D. McDonald, the principal investor in Daiflon, testified that he had paid $100,000 for a 50 percent interest in Daiflon in early 1971. McDonald, Tr. 523, 554, 572—576. This was at a time when, according to Daiflon's counsel, Daiflon was going "like a house afire. From January of '71 to June of '71, they did great. They did great." Crawford, Tr. 1386. Mr. McDonald testified further that the $100,000 that he paid for his 50 percent interest in Daiflon was a fair price arrived at in an

---

(footnote cont'd)
conspiracy to *raise* prices. Gup, Tr. 1069—1070. This theory, however, is legally impermissible. *See* respondents' N.O.V. Memo, pp. 45—46. In addition, Dr. Gup assumed that Daiflon would have had a two percent market share, a "critical" number to him which he said was based on his belief that Daiflon actually had attained that share of the market. Gup, Tr. 1089—1094. Dr. Gup's belief was shown to be contrary to the facts, which established that Daiflon's market share was substantially less than one percent. *See* respondents' N.O.V. Memo, pp. 46—47.

[21]/As Def. Exh. No. 67 (reprinted here at page 8) shows, Daiflon was losing about 16 cents on every pound of refrigerant 22 and refrigerant 12 that it sold at 70 cents per pound and 47 cents per pound, respectively. (These actual sales prices work out to a weighted price of 64 cents per pound on the basis of the proportion of the two gases sold.) Since Dr. Gup testified that the proper price would have been 60 cents per pound, on plaintiff's own evidence the refrigerant in Daiflon's tanks when the surcharge came in was a 20 cents per pound liability.

arm's length transaction. McDonald, Tr. 559.

The value assigned to Daiflon by Mr. McDonald was consistent with the valuations made at about the same time by Mr. Carter and Mr. Adams. The evidence showed that in February 1971, Mr. Carter and Mr. Adams submitted personal financial statements to The United States National Bank in Galveston in which each, respectively, represented that his 25 percent interest in Daiflon was worth $50,000—for a total value for the company of $200,000. Carter, Tr. 253—254; Def. Exh. Nos. 7, 8. There simply was no evidence at trial that might have justified the jury's finding that Daiflon, having been valued objectively at $200,000 as late as February 1971, was worth more than ten times that amount in June 1971.[22]/

Indeed, all of the relevant evidence showed that, if anything, Daiflon *declined* in value after mid-1971.[23]/ Mr.

---

[22]/The gravamen of Daiflon's claims against respondents centered on a reduction in the list price of refrigerant gas that was adopted by Du Pont in March 1971 and was followed by price reductions by the other respondents at various times over the succeeding months. Daiflon alleged that these price reductions, which Daiflon claimed put it out of business by June 1971, were the product of a conspiracy among respondents, and also constituted evidence of monopolization and attempted monopolization by Du Pont individually. The evidence relating to these claims is discussed at length in the memorandum submitted by respondents in support of their motion for judgment notwithstanding the verdict. Respondents believe that this evidence absolutely precluded a verdict in Daiflon's favor on the liability issues in this case. As noted earlier, this narrative statement does not include evidence relating to liability since, in the present posture of this matter, issues as to liability are not before this Court.

[23]/This assumes, of course, that a company that had never realized a profit during the period of its existence, and was losing 16 cents on every pound of refrigerant gas that it sold when it purportedly was "going like a house afire" (Crawford, Tr. 1386), ever could be said to have had any real value.

McDonald admitted at trial that he had had no advance warning of the surcharge or the devaluation, and that the possibility of those events had not entered into his calculations when he agreed to pay $100,000 for a 50 percent interest in Daiflon in early 1971. McDonald, Tr. 579. Similarly, when Mr. Carter and Mr. Adams each valued their 25 percent interest in Daiflon at $50,000, the import surcharge and the devaluation were only theoretical possibilities—possibilities that, according to Mr. Carter, he "had no way to anticipate" and "came as a surprise" to him.[24]/ Carter, Tr. 177.

* * * * * *

---

[24]/The only other evidence of Daiflon's value was a so-called "Statement of Projected Income" for 1971, which Mr. Carter had prepared in 1970 in order to induce The National Bank in Galveston to extend Daiflon's line of credit at the bank. Pl. Exh. No. 17; Carter, Tr. 265. That document projected that Daiflon would realize net income in 1971 of approximately $200,000. But this document, like the testimony of Dr. Gup, failed to take into account the effect of the import surcharge and the subsequent devaluation. Carter, Tr. 268. When those events are taken into account, the $200,000 in net income projected by Mr. Carter becomes a minus figure. McDonald, Tr. 582—583.

Daiflon has suggested that an element of its damages was in its lost investment of some $300,000 and its $500,000 line of credit. *E.g.*, Reply, pp. 15—17. No purpose would be served by summarizing in this statement the evidence relating to that theory since Daiflon informed respondents prior to trial, in sworn answers to interrogatories, and reaffirmed at trial that the exclusive basis of its damage claim was the testimony of Dr. Gup. *See* discussion at pages 23—24 *supra*. There can be no justification for permitting Daiflon, at this late date, to alter its theory of damages. Moreover, in order to recover for lost investment, an antitrust plaintiff must be able to show that, but for the defendant's wrongdoing, it would have realized a profit on its operations at some point. The evidence in the present case showed overwhelmingly that, because of operating inefficiencies and government action, Daiflon was destined to operate at a loss—so as to prevent any recoupment of investment. As already discussed, the evidence also shows that both Daiflon's management and its bank were aware of that fact by the end of August 1971.

In sum, the evidence at trial clearly supported the district court's conclusions as to the excessiveness of the jury's damage award. Daiflon's repeated assertions, in papers filed in this Court, that the damage award should have been sustained by the district court because Daiflon's damage evidence was "uncontroverted" and "unrefuted" are well wide of the mark. The inescapable fact is that Daiflon's damage evidence, indulging all possible inferences in Daiflon's favor, simply fell of its own weight.

II.
THE DISTRICT COURT'S CONCLUSION THAT RESPONDENTS WERE DEPRIVED OF A FAIR TRIAL

The circumstances underlying the district court's conclusion that respondents were deprived of a fair trial have been carefully explained in Respondents' Answer to Petition for Writ of Mandamus and/or Writ of Prohibition (pp. 20—28). Although Daiflon has taken issue with isolated portions of that discussion, we submit without justification,[25]/ the basic facts remain undisputed.

In brief, as of the Friday before the trial was to begin, Daiflon was taking the position that it would seek to introduce some 2,000 exhibits, comprising over 5,000 pages, and would read to the jury several thousand pages of deposition testimony. During the following weekend, Daiflon eliminated between 1,300 and 1,400 of the exhibits it previously had designated, as well as several hundred deposition pages—a step that respondents had urged repeatedly during the several-

---

[25]/ We see no need to burden this Court with a detailed response to the charges made at pages 25—26 of Daiflon's Reply Memorandum that various factual allegations in respondents' Answer are untrue or misleading. We have reviewed again the factual recitation with which Daiflon takes issue and are satisfied that it is accurate and that Daiflon's charges are unfounded.

months preceeding the trial so that objections to individual documents that Daiflon *actually* intended to offer could be considered before the trial began.

Daiflon has argued in its reply memorandum that "[t]here is no legal requirement that would require Daiflon to reduce its exhibits to a certain number or its deposition testimony to a specific number of pages." Reply, p. 25. That is, of course, correct—but misses the essential point. Respondents were entitled to be informed prior to trial of the exhibits that Daiflon *actually* intended to offer, and of the deposition pages that Daiflon *actually* intended to read to the jury. What Daiflon attempted to do here, with substantial success, was to designate so much material that respondents would not be able to determine what evidence Daiflon ultimately would offer, and prepare to meet it. The fact that Daiflon was able to eliminate during the weekend preceding the trial over 1,300 of the exhibits it had designated earlier, but has not been able to point to a single document in that group that might have been useful to it at trial, leaves no doubt as to the correctness of the district court's conclusion that Daiflon did not approach its obligations under the pretrial orders in good faith.

Unfortunately, Daiflon's paring down of its exhibits and deposition testimony came too late for objections to be raised and considered prior to trial. Thus, as the trial began, respondents and the court were confronted with over 600 exhibits, the admissibility of which had not yet been considered. As pointed out in respondents' answer to the petition (p. 27), this already difficult situation was made infinitely worse by the procedure that Daiflon employed in seeking to introduce these documents during the trial. After individual depositions had been read, counsel for Daiflon would approach the bench and ask to have stacks of documents—many of which had not been identified by any live witness or in any deposition

testimony—admitted en masse. This procedure prevented respondents from raising objections to individual documents at the time the documents were being offered. Instead, respondents were forced to prepare memoranda of objections while the trial continued. Because of the press of other obligations associated with the trial, the court almost invariably took respondents' objections under advisement—leaving literally hundreds of documents that Daiflon had offered in a state of limbo as the trial progressed.

It was not until the day that respondents' last live witness appeared that the court was able to enter an order ruling on the bulk of the objections that had been raised. The court admitted at that time 121 of the 244 exhibits that remained in dispute. Thus, respondents did not know until the trial was essentially over what exhibits would be admitted—far too late to enable respondents to prepare and present evidence relating to these documents. The extent of the consequent prejudice to respondents is indicated by the fact that of the 28 exhibits that Daiflon's counsel mentioned in the opening portion of his closing argument, 14 were not admitted until the trial of the case had been virtually completed.

In ruling on respondents' motion for a new trial, the district court conceded that it had erred in admitting certain documents into evidence. As the court pointed out:

> "We erred seriously, and we erred because of the pressure that was put on the Court to conduct a trial and to pass two hundred, three hundred exhibits, and the right to be admitted or not be admitted was wholly unfair to the Court. I sat here in this court room. We spent two hours passing on exhibits, and by the flip of the thumb I said, 'this is in' and 'this is not in' * * * [W]hether or not these exhibits come within the pale of the rule or not, why, there is no proof to show it." Tr. of May 14, pp.7—8.

In fact, no less than 95 exhibits were received into evidence at trial, over respondents' objections, without any attempt whatever by Daiflon to lay a predicate for their admission.[26]/ None of these documents had been properly identified through deposition or live testimony. There was no evidence that would have permitted any of these documents to be admitted under the business records exception to the hearsay rule. No evidence was introduced that might have permitted the court to conclude that any of the documents contained admissions by a party and was admissible on that basis. Indeed, the only basis for their admissibility—which is patently insufficient—was that they were located by Daiflon while searching respondents' files or the files of a third party during the lengthy discovery that occurred prior to trial.

Even if one assumes, despite these facts, that no error was committed here in the admission of exhibits, the prejudice and unfairness inherent in the manner in which exhibits were handled at trial would remain. By failing to comply in good faith with those provisions of the pretrial orders governing the designation of exhibits and deposition testimony, Daiflon ensured that respondents would not become aware of the evidence to which they would be required to respond until the trial was virtually over. And by relying extensively on documents mentioned in the jury's presence for the first time during closing argument, Daiflon deprived the jurors of an evidentiary basis that would have permitted them fairly to judge the documents' significance. As the district court concluded, there was here, in short, a trial lacking in

---

[26]/These documents are identified at page 17 of the memorandum filed by respondents in the district court in support of their motion for a new trial. The bases of respondents' objections to these and other documents that were admitted at trial are set forth in the various memoranda of objections filed by respondents during the course of the trial.

the elemental fairness that is guaranteed to defendants as well as to plaintiffs.

CONCLUSION

Daiflon has made much in the papers it has filed in this Court of the hardship associated with its being required to participate in a second trial. What Daiflon has failed to appreciate is that the circumstances leading to that hardship can be traced to its own doorstep. As should be apparent from this statement, the district court correctly concluded here that a new trial was required because of the unfairness of the first trial and because the damages found by the jury were grossly excessive. Jurisdictional problems aside, respondents respectfully submit that there is no basis for rejecting those conclusions.

Respectfully submitted,

JOHN S. ATHENS
DOUGLAS L. INHOFE
Conner, Winters, Ballaine,
Barry & McGowen
2400 First National Tower
Tulsa, Oklahoma 74102

Attorneys for Defendant
Allied Chemical Corporation

COLEMAN HAYES
Monnet, Hayes, Bullis, Thompson
& Edwards
1719 First National Center West
Oklahoma City, Oklahoma 73102

HERBERT DYM
JOHN P. RUPP
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Defendant
E. I. du Pont de Nemours and Company

JAMES M. STURDIVANT
SIDNEY G. DUNAGAN
Gable, Gotwals, Rubin, Fox
Johnson & Baker
2010 Fourth National Bank Building
Tulsa, Oklahoma 74119

Attorneys for Defendants
Kaiser Aluminum & Chemical Sales,
Inc., and Kaiser Aluminum &
Chemical Corporation

PETER B. BRADFORD
McAfee, Taft, Mark, Bond, Rucks
& Woodruff
Fifth Floor
100 Park Avenue
Oklahoma City, Oklahoma 73102

HENRY KOLOWRAT
Dechert Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania 19102

Attorneys for Defendant
Pennwalt Corporation

J. L. WEIGAND, JR.
Curfman, Harris & Weigand
830 First National Bank Building
Wichita, Kansas 67202

Attorney for Defendant
Racon Incorporated

D. KENT MEYERS
Crowe, Dunlevy, Thweatt, Swinford,
Johnson & Burdick
A Professional Corporation
1700 Liberty Tower
100 Broadway
Oklahoma City, Oklahoma 73102

Attorney for Defendant
Union Carbide Corporation

Dated: September 11, 1979

APPENDIX J

No. 79-1459

IN THE UNITED STATES COURT OR APPEAL
FOR THE TENTH CIRCUIT

DAIFLON, INC.,
Petitioner,

VS.

THE HONORABLE LUTHER BOHANON,
Judge of the United States District Court
For The Western District of Oklahoma, et al.,
Respondents.

REPLY OF PETITIONER TO RESPONDENTS' ANSWER TO PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION

The petitioner, Daiflon, Inc. ("Daiflon"), pursuant to the order of this Honorable Court entered June 22, 1979, now replies to Respondents' Answer to Petition for Writ of Mandamus and/or Writ of Prohibition.

INTRODUCTORY STATEMENT

On May 29, 1979 Daiflon filed a Petition for Writ of Mandamus and/or Prohibition (hereinafter "Petition) in this Court requesting the entry of an order directing the respondent district judge to reinstate the special verdict returned by the jury and to enter judgment thereon according to law. The request for extraordinary relief is based upon record facts, not in dispute, supportive of the proposition that the trial judge's order granting a new trial to defendants constitutes a clear abuse of discretion and is representative of an erroneous practice which is likely to reoccur upon retrial(s).

Defendants have answered the petition by (a) "counter-stating" the issue presented, (b) "counter-stating" alleged background "facts" relating to the controversy, (c) mis-stating the legal standards applicable to the issues before this Court, and (d) presenting further argument (using

selective bits and pieces of evidence) in an effort to explain away the jury's specific findings with respect to the impact of defendants' antitrust activities upon Daiflon, the fact of Daiflon's damages, and the amount of those damages.

Defendants' assertions with respect to the substantive antitrust issues generated by reason of the jury's special verdict have been dealt with by Daiflon at some length in the response which it filed in the trial court to the defendants' alternative motions for judgment notwithstanding the verdict and for a new trial. That response is appended hereto in its entirety as Exhibit "A."[1]

Defendants have chosen to answer the Petition by counter-stating the issue in a limited form which has no reasonable relationship to the issue presented by Daiflon. Defendants state that the issue before this Court is whether the writ may issue where the trial court, acting within its jurisdiction, grants a new trial on the basis of excessive damages and lack of a fair trial. (Ans., "Counter-Statement of Issue Presented, 2) The issue as counter-stated by defendants is virtually meaningless, and consideration of that issue by this Court would result in avoidance of the fundamental issues herein. Also, it should be noted that defendants' statement of the question is most desirable from their point of view — it provides an ideal vehicle for defendants to move into a selective discussion of "background facts," evidence, and procedural issues relating to their basic unhappiness with the special verdict of the jury.

Even accepting the "counter-issue" of defendants, the

---

[1]The response to defendants' post-trial motions is provided by Daiflon for informational purposes generally, and specifically in reply to the appendices of Respondents' Answer to Petition for Writ of Mandamus and/or Writ of Prohibition (hereinafter "Answer"). However, Daiflon does not concede that this proceeding, which is determined upon a limited record as prescribed by Rule 21(a) F.R. App.P., is the proper forum for disposition of the primary substantive issues of the case. Rather, it is respectfully suggested, this Court's inquiry is limited to the resolution of the specific issue presented in the Petition. (Pet., 12)

trial court's comments with regard to damages show that Daiflon's unrefuted evidence pertaining to damages was ignored and misstated by the court and would likely be so treated by the trial court in a second or third trial.[2] Furthermore, there is absolutely *no evidence* whatsoever that the defendants were deprived of a fair trial — only very general allegations by the defendants with regard to exhibits and depositions. There is not one specific ruling of the court during the trial that the defendants point to as evidence that they were denied a fair trial.

The issue presented is, properly stated, whether the district judge's order granting a new trial is characteristic of an erroneous practice likely to reoccur, thereby justifying the extraordinary relief sought by petitioner.

ARGUMENT

PROPOSITION I

DEFENDANTS HAVE MISSTATED THE LEGAL STANDARDS WHICH GOVERN THE RELIEF SOUGHT BY DAIFLON

In the process of seeking a new trial in the district court, defendants submitted a memorandum which materially mischaracterized the relevant case law applicable to the consideration of new trial motions. Defendants have attached that memorandum as an appendix to their Answer, and Daiflon would respectfullyy invite this Court's attention to pagaes 1 through 3 thereof. Defendants state in

[2] "The $200,000.00 that the plaintiff had wasn't enough to really get them started into breaking into this business, as long as the defendants were concerned about their business." (Court's Ruling and Comment on Defendants' Motions For Judgment n.o.v. and for New Trial, 5). This comment by the respondent judge is not only inaccurate (the original investment of Daiflon exceeded $325,000.00 in cash and property) but also alarming in its implications. What possible relevance did the trial judge perceive in defendants' concern about Daiflon's business? The jury determined, as Daiflon alleged, that it was *defendants'* "concern," as manifested by anti-competitive conduct, that resulted in the destruction of Daiflon's business.

their district court memorandum that broad discretion exists to see that the final judgmnet did not represent a miscarriage of justice; however, they omit reference to the principle that such discretion is not unlimited and that the court is not " * * * free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & Pekin Union Railway,* 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944).

With respect to the matter of the exercise of judicial discretion in connection with new trial motions, Daiflon would respectfully invite the Court's attention to the discussion of the decision of the Eighth Circuit in *Reed Brothers, Inc. v. Monsanto Company,* 525 F.2d 486 (8th Cir. 1975), *cert. denied,* 96 S.Ct. 787 in its response to defendants' alternative post-trial motions. (Exhibit "A," pp. 9-12, 91-93). *Monsanto* involved the reversal of the trial court's alternative grant of the defendants' motion for new trial. Mr. Justice Clark, speaking for the Court, stated that while the grant of a new trial is peculiarly within the trial court's discretion, a different situation exists where the grant is predicated upon the district court's "appraisal of the evidence." 525 F.2d at 499. Noting that the trial judge in such situations should not interfere with the role of the jury as trier of fact, Mr. Justice Clark determined that the " * * * evidence was such that reasonable men could differ as to result, and there existed no significant weight favoring Monsanto." (*Id.,* 500) Correct standards were applied by the Eighth Circuit Court's decision in *Monsanto.*

Defendants, successful at the district court level, seek to employ a substatially similar, and deceptive, form of advocacy in this court. Defendants' Answer does not accurately describe the law which has developed under the All Writ Act with respect to the exercise of supervisory

jurisdiction by way of mandamus and/or prohibition. This Court is well aware of the proper standards to apply in this case; nevertheless, a short discussion of the insufficiency of defendants' Answer with respect to the question of the availability of extraordinary relief is important not only as it relates to that issue, but also with respect to the larger question of the accuracy and credibility of several of the other claims and assertions which have been advanced by defendants.

Defendants launch into their discussion of "applicable legal standards" with the "clear" proposition that:

> " * * * Mandamus cannot be used as a substitute for appeal, but is limited to those truly extraorinary cases is [sic] which a trial court either has exeeceded its prescribed jurisdiction or failed to perform a ministerial duty owed to the moving party. This means, as a practical matter, that an order granting a new trial is not reviewable on mandamus unless the petitioner can establish that the trial court lacked jurisdiction to set aside the verdict and order a new trial." (Ans., 10-11)

Defendants conclude that since the motion for new trial was timely and the trial court had jurisdiction to consider the motion, this Court "must" deny Daiflon's request for relief. (*Id.*, 14)

Defendants' interpretation of the law under the All Writs Act is clearly erroneous. The relevant, applicable legal authorities with respect to Daiflon's request for relief are set forth at pages 24 through 29 of the Petition. As those cases reflect, relief under the All Writs Act is not limited to new trial orders issued without jurisdiction, or to the performance of a "ministerial duty owed to the moving party." Rather, circuit courts have recognized the availability of prerogative writs in a number of situations where the trial court has exceeded or wrongfully refused to exercise its judicial power, or has committed a clear abuse of discretion.

Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971); *General Motors Corp. v. Lord,* 488 F.2d 1096, 1099 (8th Cir. 1973) (and cases cited therein).

Perhaps the most compelling reason for considering the use of the supervisory writ of mandamus in certain situations where the trial court has ordered a new trial is the fact that, in theory, a final judgment may not arise from which the verdict winner can take appeal. This was recognized by Circuit Judge Bright in his concurring opinion in *Lord:*

> "This case has already consumed seven weeks of trial time; another trial will surely utilize an equal amount. And if a contrary result is produced in that trial by exclusion of the questioned evidence referred to in the majority opinion, yet a third trial may be required * * * ." 488 F.2d at 1100-1101.

This Court recognized the possibility of continuing, interlocutory, unappealable orders in *Kanatser v. Chrysler Corp.,* 199 F.2d 610 Cir. 1952), *cert. denied,* 73 S.Ct. 388. There the trial court stated that under no circumstances would it permit a verdict in excess of $15,000.00 to stand. Accordingly, this court noted that if the trial court's statement was "accepted on its face, it means that other trials of the case resulting in a verdict in excess of $15,000.00 would never reach this Court for review of the order sought now to be reviewed, for each case would result in an unappealable order granting a new trial." 199 F.2d at 616. Likewise, in this case, it is evident that the court is proceeding with a grave distrust of the jury's ability to return a "proper" verdict,[3] and that a subsequent judgment

---

[3] "These kinds of cases are not easy cases, and particularly not easy for jurors where issues are completely foreign to them. They don't understand about this gas business. After weeks of work they get where they do." (Court's Ruling and Comment on Defendants' Motion for Judgment NOV and for New Trial, Exhibit "A" to Petition, 4)

for Daiflon as prayed for in the complaint would be subject to the precise post-trial, unappealable action which the district court has heretofore taken.[4]

The correct standard of review, when applied to the specific facts of this case, supports the specific relief requested by Daiflon.

PROPOSITION II

THIS CASE IS ENTIRELY APPROPRIATE FOR THE AWARD OF EXTRAORDINARY RELIEF UNDER THE ALL WRITS STATUTE

A. Relief Under the All Writs Statute is available in "Extraordinary" Circumstances Including Situations wherein Action is Necessary to Preserve the Jurisdiction of the Court.

Daiflon earnestly disputes defendants' suggestion that extraordinary circumstances justifying relief under the All Writs Act are absent here. Daiflon submits that the correct context in which to evaluate the propriety of such relief is in the context of the general supervisory power of appellate courts and particularly under the language of All Writs Act. It is apparent (1) that this relief is available on a broader basis than respondents attempt to suggest; and (2) here, the situation comes within an express provision of the All Writs Act.

Grace Lines, Inc. v. Motley, supra dealt specifically with the availability of extraordinary relief under the All Writs Act. The language of the *Motley* case, which was quoted with approval in the *Lord* case, is precisely in point in disclosing that the very purpose of the All Writs Act

> " * * * is to enable federal appellate courts to review by mandamus non-appealable interlocutory orders

---

[4] "The defendants had a perfect right to meet competition, and for them not to meet competition is to deny them free enterprise." (*Id.*, p. 5)

> which would be the subject of review in appeal from a final judgment . . ." (439 F.2d at 1031, n.2)

Thus, although appellate courts are indeed careful to preserve the "final judgment" rule by confining the availability of relief under the All Writs Act to appropriate situations, nevertheless:

> "Mandamus will lie, in the sound discretion of the appellate court, where the trial court has . . . committed a clear abuse of discretion." (439 F.2d at 1031, n.2)

Further, since the objective of the All Writs Act is to assure that federal appellate courts are accorded supervisory powers, such supervisory powers are broad and embody the use of discretionary orders of various types as required by the needs of each particular case. In addition, the self restraints which appellaate courts frequently exercise to assure that intervention does not occur indiscriminately should not be considered as a limitation of the courts' powers. 20 Am.Jur.2d, *Courts*, §116.

It must be emphasized, as the Court of Appeals for the Eighth Circuit has pointed out, that the circumstances which will normally make the situation an "extraordinary" one warranting interlocutory relief under the All Writs Act exist if " . . . the order under attack is characteristic of an erroneous practice [which is] likely to reoccur." *General Motors Corp. v. Lord, supra.*

B. Respondents' Position Ignores This Court's Express Power Under the All Writs Act to Intervene to Protect its Own Jurisdiction.

In reality, respondents' lengthy discussion of their version of principles governing the applicability of mandamus in the abstract is largely irrelevant here. Daiflon respectfully submits that any objective review of the district court's handling of this litigation, viewed against the background of the relataive resources of the litigants, discloses that respondents' suggestion of appeal following a

second or third trial is an illusory concept, which ignores the practical inability of Daiflon to continue such litigation. Moreover, respondents' suggestion conveniently overlooks the prior action of this Court when it acted to prevent the trial court from disposing of this litigation summarily.

Respondents do not, because they cannot, counter Daiflon's recognition of its stringently limited capacity to carry forth the litigation. Consequently, immediate relief is entirely appropriate to preserve this Court's ability to exercise its right to review the entire proceedings on appeal. On this ground alone the present situation comes within that portion of subsection (a) of the All Writs Act, 28 U.S.C. §1651(a) expressly providing that courts "may issue all writs necessary in aid of [their]... jurisdiction..."

In addition to the attempt to advance standards which are actually not applicable here, respondents' only answer is the suggestion (Ans., 9, 36) that Daiflon is somehow estopped to obtain relief in this Court because of procedures for the recusation of the trial judge. The contention that Daiflon should have sought disqualification of the trial judge prior to the commencement of trial is, of course, irrelevant to this proceeding. With respect to Daiflon's opportunity to pursue disqualification at this time, in lieu of proceeding under the All Writs Act, it is clear that such a course of action does not, for the reasons heretofore stated, present a viable remedy; moreover, this Court's power under the All Writs Act to order the extraordinary relief sought by Daiflon is wholly independent of the availability or non-availability of the statutory prodedures set forth in 21 U.S.C. §§144 and 455. Any suggestion by defendants to the contrary is inconsistent with the discretionary nature and responsibility of this Court's supervisory power.

PROPOSITION III
THE TRIAL COURT'S ACTION WITH RESPECT TO THE JURY'S DETERMINATION AS TO

DAMAGES WAS VIRTUALLY IRRATIONAL, FAILS TO CONSTITUTE A REASONED EXERCISE OF JUDICIAL DISCRETION, AND CONSTITUTED AN UNWARRANTED AND UNACCEPTABLE ENCROACHMENT ON THE RIGHT OF THE JURY.

A. Mere Action by a Court is Not Synonymous with Meaningful Judicial Discretion.

Throughout their Answer respondents seek to assume, improperly, that any action of the lower court in the entering an order constitutes, in-and-of-itself, *bona fide* exercise of "judicial discretion."

The meaning of judicial discretion in the correct sense, was addressed by the Supreme Court in *Langnes v. Green,* 282 U.S. 351 (1931) wherein this definition was set forth:

> "The term 'discretion' denotes the absence of a hard and fast rule (citing authority) *When invoked as a guide to judicial action it means a sound discretion, that is to say a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances, and the law, . . .*"(282 U.S. at 541; emphasis added)

This Court has made a similar observation in *Atchison, Topeka & Santa Fe Railway Co. v. Jackson,* 235 F.2d 390 (10th Cir. 1956) where it was said:

> The term 'discretion' when used as a guide to judicial action means sound discretion directed by reason and conscience to a just result, and it frequently involves painstaking consideration of many factors, giving to each the weight to which it is appropriately entitled." 235 F.2d at 393)

It is thus appropriate to consider whether the Court's order granting a new trial on a basis of alleged excessiveness of the jury's damage determination was in fact a reasoned determination evidencing the exercise of a sound discretion

having appropriate regard for the evidence proferred and the governing law.

B. The Court's Action was Capricious and Arbitrary and Disregarded Daiflon's Evidence and the Pertinent Law.

In order to focus on this issue it is necessary to repeat here the pronouncements of the trial court on the issue of the jury's determination of damages. The court's declarations (Exhibit "A" to the Petition) were as follows:

> "When you consider the verdict, two and a half million dollars — when you consider that this company started out with a capital investment of $200,000.00 to get into a business that runs into the millions, it would be just me going out here and saying, 'I'm going to get a block and drill a well, on $100,000.00.'
>
> Why, you couldn't even get started.
>
> The $200,000.00 that the plaintiff had wasn't enough to really get them started into breaking into this business, as long as defendants were concerned about their business.'
>
> * * *
>
> 'You can consider the earnings, 1969, 1970, 1971. If you consider the earnings, 1969, 1970, 1971, there is no basis upon these earnings by the company to project that they lost two million five hundred thousand dollars. Their earnings during these years were insignificant to say that builds into a judgment, a verdict, of two and one-half million dollars.'
>
> 'What are the actual damages? There is nowhere it reaches two and one-half million dollars.'
>
> 'Now the act provides where you find a conspiracy, and it is an operation, why for punishment, the court adds, triples it; but you can't say there is two and one-half million dollars in damagaes from the years 1969, 1970 and 1971 operation." (Exh. A to Pet., 5-6)

Daiflon's evidence with respect to damages is summarized on pages 72 through 78 of its attached brief in

response to respondents' motion for a judgment notwithstanding the verdict and new trial. Briefly stated, Daifon proferred proof of damages of three elements: first, loss of investment and incurring of indebtness when Daiflon was required to cease business operation and dispose of its assets on a forced sale basis; second, diminution of profits during the period of Daiflon's business operations arising by reason of defendants' conduct; third, lost future profits after October, 1972 when Daiflon was required to discontinue business operations entirely.

With regard to the loss of current and future profits, Daiflon presented the unrefuted testimony of its president, Mr. Carter, and the economist, Dr. Gup.

Mr. Carter's testimony is summarized at pages 73 and 74 of the attached brief. Without belaboring the matter, such testimony and the accompanying written exhibit (Pl. Exh. No. 17) revealed, *inter alia*, (1) that Mr. Carter had prepared a projected profit and loss statement for use in conjunction with the business; (2) that this statement was detailed, embodying the whole spectrum of anticipated business expenses; (3) that his analysis produced projected net earnings of $400,000 annually; and (4) that Mr. Carter had thus internally established for Daiflon a value of $3,000,000 based upon the extension of the $400,000 anticipated net earnings over a projected life of eight years, such eight-year period being the standard then in use by the business community.

Dr. Gup, whose testimony is summarized in pages 75 to 77 of the attached brief, testified at length concerning the method he developed for valuing Daiflon, including the various industry and economic factors (Brief, p. 77) which his study took into account. Based upon this overall review, Dr. Gup reached a range which constituted his estimate of Daiflon's going concern value as of the time that it ceased operations. So doing, he reached a "most likely" estimate of going concern value of $2,900,000, while further concluding

that this one facet of the company's damages could be as low as $610,000 or as high as $13,000,000.

Daiflon's evidence with respect to its capitalization, and the resources to which it had access, consisted of the testimony of Messrs. Carter and McDonald (Brief, pp. 72 to 75). Summarized briefly, their unrefuted testimony proved that at the time the Daiflon business was established in Galveston, Texas, its available resources included: the assets of Carter Supply Company having a value of $75,000.00; (2) the sum of $100,000.00 contributed to the capital of the business by Mr. McDonald; (3) the sum of $100,000.00 loaned to the company by Mr. McDonald; (4) $50,000.00 of equity capital contributed by Mr. Adams; and (5) a $500,000.00 line of credit (originally $400,000.00 before being increased), extended by a national bank located in Galveston. Based upon these resources, and taking account of the nature of the business as a purchaser and reseller, Mr. McDonald testified that the financial foundation which Daiflon had as of early 1970 was "extremely sound for a young business" (McDonald Tr. 524).[5]

Respondents proferred no rebuttal to Daiflon's evidence as to the amount of damages, and further offered no evidence that Daiflon's resources were not adequate to enable it to conduct the purchase and resale operation for which it was formed.

Against this background the trial court's determination with respect to damages clearly falls far short of constituting a rational and reasoned exercise of the judicial

[5]Significantly, also, the trial court drastically restricted Daiflon's proof of damages (Petition, pp. 32 to 43) by excluding proferred evidence of a prospective establishment of a manufacturing plant. The court did so notwithstanding that Daiflon had proferred evidence that (1) Daiflon had made an analysis of the prospective profitability of such a plant; (2) made inquiries to secure financing; (3) selected a plant site; (4) obtained an option on the land; and (5) contracted with Dow Chemical Co. of the purchase of necessary raw materials required in the manufacturing process.

decision-making process. To the contrary, it is so permeated with failures of basic logic, fallacious assumptions to the facts, and misconceptions of the law, as to reveal, on its face, its whimsical, capricious and arbitrary nature. Furthermore:

1. In contrast to the court's repeated reference to $200,000.00 as Daiflon's available working capital, the undisputed evidence places the total equity capital at $225,000.00, and the total available financial resources at $825,000.00.

2. The court's declarations and its preoccupation with the years 1969 through 1971 suggest that it considered Daiflon's measure of losses to be merely diminished profits during its period of operations, excluding any factor for lost potential future profits;

3. By giving conclusive weight to the fact that one-half the capital stock of Daiflon was, in 1970, obtained for $100,000.00, the Court confuses the distinct and separate elements of Daiflon's damages, and, more fundamentally, assumes without any supporting legal base, that an antitrust plaintff is not entitled to the benefit of a favorable investment decision — including the recognition that respondents' monopolistic practices created a situation not conducive to the entry of a new competitor.

4. The Court fails to recognize even the possibility that Daiflon's earnings during all or most of its formative years, in accordance with the express testimony of Dr. Gup, may have been depressed for the specific reason of respondent's antitrust violations; and

5. The court's statements indicate its notion that the trebling provisions of §4 of the Clayton Act, §15 U.S.C. justifies the trial court in interjecting itself into the jury's determination as to actual damages.

It should be noted also, that in the course of the trial,

the court formulated a special verdict (Exhibit "B" to Daiflon's Petition) items 9 and 10 of which focused on the matter of the fact and amount of damages. Respondents' counsel embraced the special verdict in all respects. Daiflon's counsel objected to the form of portions of the verdict, including specifically its failure to recognize the separate elements of Daiflon's damages by not distinguishing between (1) losses on the disposition of assets, (2) lost profits during Daiflon's period of actual operations and (3) lost prospective profits. The trial court declined Daiflon's request. However, by its verdict, the jury reached a determinataion which appears to embody its assessment of Daiflon's *total damages,* and sets such amount at a factor of $400,000.00 below Dr. Gup's estimate of lost future profits alone. Based on this background, and the jury's consistent answers to each of the items of the special verdict, it is not unfair to state that it appears that it is not the jury but the trial court which "doesn't understand this gas business".

C. The District Court's Action Violated Established Principles with Respect to the Relative Functions of the Court and Jury with Respect to Determination of the Amount of Damages.

It is apparent from a review of the authorities that, in considering the propriety of new trial orders, a sharp distinction is drawn between situations in which such orders are entered because the court erred as a matter of law, and situations in which they are entered because the court disageed with the jury's assessment of the evidence. With respect to the latter situation, it is stated that a court should refrain from interfering with the jury's determination unless it is clear that the jury has reached a result which is "seriously erroneous". Moore, *Federal Practice,* Vol. 6A, §59.08(5), n. 24. Further, this principle applies with particular force when the rationale of the court's action is its belief that the jury erred with respect to the *amount* of its award.

Moore, *supra*, citing e.g. *Draper v. Erie Railroad Company*, 183 F.Supp. 899, (W.D.Pa. 1960), aff'd 285 F.2d 255 (3rd Cir. 1960).

Professor Moore also points out that in no event is a judge justified in substituting his judgment for that of the jury in matters resting upon a review of the evidence. See *Moore*, Vol. 6A, §59.08(5), n. 34. As stated in one of the other authorities cited by Professor Moore, *University Marketing and Consulting, Inc. v. Hartford Life & Accident Insurance Company*, 413 F.Supp. 1250 (E.D.Pa. 1976):

> The Court is not free to set aside the verdict merely because it may have awarded a different amount of damages, but may do so only if the proceedings have been tainted by appeals to prejudice, or if the verdict in light of the evidence, is so unreasonable that it would be unconscienceable to let it stand." (413 F.Supp. at 1264)

The mere articulation of such a standard effectively demonstrates that, by its order, the trial court improperly interjected itself into the domain of the jury. The jury's determination as to the amount of damages was well within the evidence proffered by Daiflon. Respondents failed to present any countervailing evidence.

This Court can properly review the action of the district court, and correct errors of the type here involved, as is apparent from such cases as *Reed Brothers, Inc. v. Monsanto Company, supra*, 525 F.2d 486 (8th Cir. 1975), cert. denied 96 S.Ct. 787 (1976). There, in the particular context of a trial court's award of a new trial in an antitrust case, the appellate court addressed the proper relationship between court and jury, and the more restrictive standards applicable to new trial orders premised upon the court's weighing of the evidence. The following language of the court is directly applicable here:

> "When a verdict is set aside because evidence was erroneously admitted or where the trial court has

erred in instructing the jury, it is generally thought appropriate to uphold the granting of a new trial as being peculiarly within the discretion of the trial judge, since he is considered in a better position to correct a manifest injustice. A different situation exists, however, where the grant is based on the district court's appraisal of the evidence, for we must ever be sensitive that the trial judge not interfere with the role of the jury as trier of fact. In this regard, the Judge Lay stated in [*Firemen's Fund Insurance Co. v. AALCO Wrecking Co.*, 446 F.2d 179 (8th Cir. 1972), cert. denied 410 U.S. 930 (1973)] that:

> 'Regardless of the rhetoric used, the true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred.' "

(525 F.2d at 499)

The most that can be said for the district court's action is that it evidences the proposition that, had the judge been sitting as a juror, he would have reached a result different from that rendered by the jury in its carefully considered verdict. In no event, however, is this a justification for the court's action in setting aside the jury's determination. Moore, *supra,* Vol. 6A §59.08(5).

The trial court's disposition of the damage issue, whether characterized as a gross abuse of discretion or the failure to exercise meaningful discretion, was arbitrary and capricious, so that immediate action by this Court is proper under the precedents which Daiflon has cited above.

PROPOSITION IV

THE DEFENDANTS' CLAIM THAT THEY WERE DEPRIVED A FAIR TRIAL BY VIRTUE OF DAIFLON'S ALLEGED FAILURE TO COMPLY

WITH PRE-TRIAL ORDERS IS FALSE, AND KNOWN TO BE FALSE BY DEFENDANTS

Defendants have seized upon certain of the comments made by the respondent district judge in connection with his ruling on the motion for new trial to the effect that Daiflon kept defendants, the judge, and even the court clerk "in the dark" during the entire course of trial with respect to the items of evidence which were to be presented on its behalf. (Ans., 20-30; *See,* Court's Rulings and Comments on Defendants' Motions for Judgment NOV and For New Trial, attached as Exhibit "A" to Petition, 2-3) This contention is reminiscent of that asserted by defendants in 1974 with respect to Daiflon's alleged failure to answer a single interrogatory — a matter which ultimately led to the trial court's dismissal of this action with prejudice, under Rule 37(B)(2)C). *Daiflon, Inc. v. Allied Chemical Corp.*, 64 F.R.D. 690 (W.D.Okl. 1974); *rev'd., Daiflon, Inc. v. Allied Chemical Corp.*, 534 F.2d 221 (10th Cir. 1976). Defendants' distorted view of what constitutes compliance or non-compliance with orders of the court is amply demonstrated by the fact that they still cling to the created fiction that "Daiflon's conduct leading to dismissal of this case in 1974 was indeed reprehensible * * *" (Ans., 31) That issue was, of course, settled by this Court in 1976, when it was determined that Daifoln had complied with all discovery obligations under the Federal Rules and had violated no order of the Court. However, defendants learned in 1974 that the trial judge was in fact susceptible to the concept, however false and/or misleading, that Daiflon did not comply with discovery requests and/or orders entered thereon. The same approach continues here.

Daiflon has comprehensively answered this claim of defendants in Proposition IX of its Response to Defendants' Motion for Judgment Notwithstanding the Verdict and for New Trial (Exhibit "A" hereto, pp. 94-106), and in pp. 15-21 of the Petition. Accordingly, Daiflon shall not

restate its position here, but respectfully invites this Honorable Court to the designated portions of its Petition and attached Response.

Nevertheless, in this regard it is necessary for Daiflon to respond to untrue and misleading statements made by the defendants in their Answer.

The proof of conspiratorial and monopolistic acts by the defendants had to be established primarily by Daiflon through exhibits from the defendants' files and depositions of the defendants' personnel. Recognizing this, and knowing that they could not prevail if their personnel were to take the witness stand, the defendants launched a massive attack against the exhibits and depositions many months prior to the trial.

The attacks upon the number of exhibits and the number of deposition pages to be introduced were obviously designed to reduce Daiflon's evidence to a point where Daiflon could not prevail. There is no legal requirement that would require Daiflon to reduce its exhibits to a certain number or its deposition testimony to a specific number of pages. The defendants' complaints prior to the trial went to the *number* of exhibits and depositions, and they made no objections with regard to any specific exhibits or depositions, as required by the trial court's pre-trial order. The exhibits and depositions which the defendants claim were "confusing" came from their own files, and the deposition testimony came from their own personnel! The defendants clearly were alert to the content of the exhibits and the depositions and, knowing their evidentiary effect, endeavored to reduce and eliminate such evidence by allegations which are totally unfounded, such as:

1. "... Daiflon's failure to provide copies of the documents to all of the defendants." (Ans., 21) NOT TRUE. Daiflon agreed with counsel for Union Carbide to make copies of the designated exhibits

for all defendants with Daiflon to pay the cost, which was done.

2. "On August 22, 1978, . . . Daiflon delivered to respondents 16 of the 30 deposition transcripts it originally had designated — advising respondents that the remaining 14 transcripts would be delivered at some later date." (Ans., 23) MISLEADING. The "later date" was the next day, August 23, 1979, when the remaining 14 transcripts were delivered to defendants with the concurrence of counsel for Kaiser.
3. "Examination of the 16 transcripts delivered on August 22 revealed that Daiflon had eliminated a total of only five pages from its original designation." (Ans., 23) NOT TRUE. Daiflon eliminated in August 1978 approximately one-third of the deposition lines it had previously designated, in accordance with the trial court's instructions.
4. " . . . Daiflon did not provide respondents with a listing of those documents it actually intended to use at trial." (Ans., 23) NOT TRUE. In July 1978 Daiflon delivered to defendants copies of all documents which it intended to introduce at trial. (Case-in-chief, cross-examination and rebuttal).
5. "On August 25, 1978, respondents submitted counter-designations of deposition testimony and provided Daiflon with a listing of the documents they intended to use at trial." (Ans., 24) NOT TRUE. The defendants presented many documents on cross-examination during the trial that had not been previously furnished to Daiflon.
6. " . . . counsel for Kaiser wrote to Daiflon's counsel on January 17, 1979 . . . . Daiflon's counsel did not respond to this letter." (Ans., 25) NOT TRUE. In view of the court's pre-trial order, counsel for Daiflon *personally* responded and advised counsel

for Kaiser that the letter of January 17, 1979 was self-serving and not deserving of an answer.

7. "Counsel for some, but not all, respondents received from Daiflon on that day [March 2, 1979] some 300 additional pages of documents that Daiflon proposed to use at trial." (Ans., 25) MISLEADING. Daiflon gave copies of the 8 additional exhibits to all counsel for the defendants and the trial court rejected all 8 exhibits from the evidence on the ground that Daiflon had not designated these exhibits earlier.
8. "This already difficult, and unfair, situation was made infinitely worse by Daiflon's offering into evidence as the trial progressed numerous documents that had not been identified by any live witness or in deposition testimony." (Ans., 27) MISLEADING. Many of Daiflon's exhibits were properly admitted under Rule 901 of the Federal Rules of Evidence, which does not require identification by live witnesses or in deposition testimony. (See plaintiff's Response to Defendant's Motion For Judgment Notwithstanding The Verdict And For New Trial, Exhibit "A" hereto, 100-102.)
9. " . . . neither respondents nor, indeed, the courtroom clerk were able to identify with certainty until near the end of the trial which documents were being offered, and for what purpose." (Ans., 27) NOT TRUE. There never was any question about which documents were being offered and for what purpose. There was a question near the end of the trial with regard to whether some documents had been *admitted* into evidence by the trial court, and this came about by the defendants' constantly rearguing their positions to the court to exclude from the evidence documents which the trial court had previously admitted. Moreover, it was the

plaintiff, not the defendants, that provided the clerk with a typewritten list of each exhibit to be offered, including a complete description of the exhibit, *i.e.*, author, recipient, date, and title of document.

10. " . . . of the 28 exhibits that Daiflon's counsel mentioned in the opening portion of his closing summation, 17 were not properly identified by any witness." (Ans., 28) MISLEADING. Here again, the defendants are endeavoring to restrict Daiflon to identification of documents only by a witness without acknowledging the self-authentication provisions of Rule 901.

It is therefore obvious that the defendants are attempting to create issues pertaining to documents and depositions that have no basis in fact. Had their complaints been valid, they could have asked for a short postponment of the trial or time within which to further analyze the exhibits and depositions which had been in their possession for more than six months. No such request was made by the defendants.

Equally without basis is the contention of the respondents that the trial court was required to make its evidentiary rulings on other than a reasoned basis. In sharp contrast to the trial court's comments in its narrative order for a new trial, the trial court heard the argument pertaining to the admissibility of exhibits at length and often filed written decisions pertaining to the admissibility or non-admissibility of documents after admission of briefs by the parties. (See, *e.g.*, Exhibit "G" to Petition).

The absurdity of defendants' contention is amply demonstrated by their reply to the district judge's statement that a pre-trial conference would be held to pass on evidentiary disputes prior to the second trial.[6] Defendants

[6]Court's Rulings and Comment on Defendants' Motions for Judgment NOV and for New Trial, 7.

cite the Antitrust Commission Report wherein it is stated that there should always be a specific listing of objections to proof prior to trial. 80 F.R.D. 509, 591 (1971), cited at pp. 35-36 of defendants' Answer. This is precisely the procedure which was followed prior to trial in this case. The Court's pretrial order of May 15, 1978 and the Suggested Trial Procedure filed August 7, 1978 *absolutely* require that objections with respect to admissibility of exhibits be made within fifteen days from the date that exhibits were to be exchanged — a full six and one-half months prior to trial. The only objections which defendants raised prior to trial with respect to Daiflon's exhibits were contained in a motion in limine and supporting brief filed February 20, 1979 — sustained by the district court on March 2, 1979. Defendants thereafter proceeded to await the offer of evidence by Daiflon during the course of trial, interposing objections for the first time when the exhibits were offered. Defendants successfully prevented admission of 423 of the 689 exhibits which Daiflon sought to introduce.

Defendants have not pointed to a single order of the court, either in the form of a written order filed of record or an oral ruling from the bench, altering the parties' obligation to object to designated exhibits prior to trial. In the end, defendants "hid behind a log" until Daiflon commenced its case in chief. Defendants proceeded to object on every conceivable ground to substantially all exhibits offered, and provided the trial court with approximately seventeen (17) separate written briefs during the course of trial attacking the admissibility of Daiflon's exhibits and deposition testimony. To a large part, defendants were successful.

The defendants were well aware that when they complained to the trial court about anything pertaining to the plaintiff's attorneys, that the trial court would accept their complaint as true and admonish the plaintiff's attorneys. Throughout the entire proceeding the defendants

would complain and then the plaintiff was lectured by the trial court about not introducing too many exhibits, not reciting too much from depositions, and not confusing the jury. There was *never* a harsh word spoken by the trial court to any of the defendants' attorneys nor were the defendants' attorneys ever admonished for their misconduct. In fact, the court defended their improprieties even to the extent of excusing counsel for Pennwalt's statement to the jury regarding criminal sanctions, an act by counsel which was absolutely contrary to the trial court's order granting *defendants'* motion in limine on March 2, 1979.[7] Counsel for Pennwalt stated to the jury during closing argument:

> "One final thought: You know, a violation of the antitrust laws is a criminal violation. Now we are not trying a criminal case here. It's a civil case, but that's like stealing. Stealing is a criminal violation, and if somebody steals something from you, you can also sue them for damages.
>
> These people are accusing us of a very serious thing, very serious thing.
>
> We are not talking — sure, we are talking about big companies, but big companies aren't empty buildings. There's a lot of people in there, people come to work, people have jobs, people have fairness, people have pride in their jobs, and what they are saying is that the people committed a crime."
>
> (Proceedings at Arguments for Defendants, et al., March 28, 1979, 116)

Following the conclusion of defendants' arguments, counsel for Daiflon objected to the foregoing remarks, and the following colloquy with the court and Pennwalt's counsel occurred:

> MR. CRAWFORD: "If the Court please, if I may, your Honor, comes now the plaintiff and respectfully

[7]The motion in limine requested, in part, that the court preclude by pre-trial order any reference at trial to defendants' prior involvement in civil and criminal federal antitrust proceedings.

takes exception to counsel for Pennwalt's comments in relating of answers to questions to the jury, to which objections had been sustained by the Court.

Further, respectfully takes exception and objects to the conduct of counsel for Pennwalt in making reference to a criminal proceeding in the presence of the jury.

THE COURT: I heard that. What is your request of the Court in connection with it?

MR. CRAWFORD: Well, your Honor, I am hesitant to object to counsel in the presence of the jury.

THE COURT: Well, you didn't. The jury is outside the court room. You are talking to the Court now.

MR. CRAWFORD: I am suggesting to the Court that whatever action the Court would take would be appropriate. I don't know if the jury should be instructed to disregard it or not.

THE COURT: Are you asking for a mistrial?

MR. CRAWFORD: No, sir. I am not asking for a mistrial.

THE COURT: You want me to admonish the jury to disregard it, and make it worse?

MR. CRAWFORD: No, I think perhaps counsel for Pannwalt should be admonished, your Honor. I think it is highly irregular and improper conduct.

THE COURT: Well, I was surprised —

MR. KOLOWRAT (Counsel for Pennwalt): May I say this, your Honor?

THE COURT: I think it was a slip of the tongue and not intentional, but I was surprised that you did say it or even infer that these defendants are not criminals and so forth.

MR. KOLOWRAT: I did not make reference to the criminal proceeding, your Honor. This is not correct. The criminal proceeding that we are not —

THE COURT: You said that the antitrust law was a criminal law or words of that nature.

MR. KOLOWRAT: But I made it clear that we are here in a civil case.

THE COURT: That these defendants, not the lawyers, but the defendants, were not criminals.

MR. KOLOWRAT: Yes.

THE COURT: It was unthoughted and unintended and I don't think it had any effect on the jury. I really don't. But it was a mistake. You shouldn't have said it, because it's not a criminal case, and I admonished early in the beginning of this case that any "smack" of any criminal reference was out.

MR. KOLOWRAT: I understand, your Honor. Certainly no reference to that was intended. What I intended was to simply convey something which I think the jury otherwise understands — that this is a serious matter.

THE COURT: I think that was the intention, that it was serious as to all parties. Well, the Court won't do anything about it, but don't do it any more.

MR. KOLOWRAT: I don't think I'll have a chance, your Honor." (*Id.*, 121-123)

It was the defendants, not the plaintiff, that failed to follow the trial court's orders and in particular, it was the defendants, not the plaintiff, that failed to comply with the pre-trial orders. It is not so much, as the trial court stated, that the plaintaiff's attorney had the jury in the palm of his hand, but rather that the defendants' attorneys had the court in the palms of their hands.

PROPOSITION V

DEFENDANTS' COUNTER-STATEMENT OF BACKGROUND FACTS CONTAINS MANY INACCURACIES AND MISSTATEMENTS

The defendants contend (Ans. 3) that Daiflon filed complaint in July, 1972, and then alleged that it was not until mid 1977, after discovery, that Daiflon sought to charge DuPont with having violated §2 of the Sherman Act.

The Complaint filed July 12, 1972, clearly states in paragraph 15 the charge that DuPont violated §2 of the Sherman Act. The defendants' endeavor to avoid this charge was briefed and argued over a period of several months in various hearings during 1978 and the charge was finally included in paragraph 18 of the Pre-Trial Order.

The Defendants *did* alleged during the trial that Daiflon's failure" was due to a combination of government action and of "Daiflon's own unique operating problems" (Ans. 3). However, the defendants failed to prove these allegations and offered no factual evidence to counter Daiflon's proof that it was the defendants who drove Daiflon out of business by actions in violation of §1 and 2 of the Sherman Act. It is clear from the evidence that Daiflon was being shut down by the defendants' conspiratorial acts long before any surcharge or devaluation of the dollar came about. The use of the word "disastrous" (Ans. 4) by Daiflon's president, Richard E. Carter, was in a letter to the Japanese suppliers and was obviously an endeavor to gain assistance from the supplier by a reduction in the sales price to Daiflon to offset the surcharge.

It should be noted that the *defendants'* own evidence established that subsequent to the surcharge and the devaluation of the dollar against the yen, Japanese imports to the United States have considerably increased (Bradfield, Tr. 61-65). Surely, the defendants cannot contend that the surcharge and devaluation would have been effective only against the importation of refrigerant gas while not against the importation of automobiles, radios and the many other Japanese imports! In addition, the inference by defendants (Ans. 4) that the surcharge caused Daiflon not to place any additional orders with the Japanese suppliers is totally contrary to the evidence. The evidence is unrefuted that Daiflon was running out of customers in August, 1971 due to the conspiratorial conduct of the defendants. The evidence is unrefuted that it took Daiflon several months

thereafter to dispose of the refrigerant gas it already had on hand during August, 1971, because of the unlawful acts of the defendants. The evidence is further unrefuted that there was no effort by Daiflon to purchase refrigerant gas from its Japanese suppliers after August of 1971 because the defendants had succeeded in prohibiting Daiflon from having customers to purchase such gas.

The defendants' allegation (Ans. 4) that "the devaluation of the dollar as against the yen had the effect of increasing by some 17% the cost of imported Japanese goods, including refrigerant gas" is not correct. This contention was not even made by the defendants during the trial. The surcharge was only in effect three months and then the defendants' contention was that the devaluation of the dollar merely *replaced* the surcharge (Bradfield Tr. 29).

The defendants' allegations (Ans. 5) that "Daiflon had failed to adduce substantial evidence of a conspiracy among any or all of the defendants" and "that there had been a complete failure of proof as to damages" are absolutely and completely refuted by the evidence as shown in Daiflon's Response to Defendants' Motion for Judgment Notwithstanding the Verdict and for a New Trial, a copy of which is attached hereto marked Exhibit "A".

The defendants again (Ans. 5) make their general assertion that "a number of events at trial, including the receipt into evidence of a mass of inadequately qualified and otherwise inadmissible documents, had deprived them of a fair trial." This statement is unfair and not true. Apparently the defendants believe that by making this misstatement over and over again that somebody will eventually believe it. The true facts relating to this contention are set forth in Daiflon's Petition, pages 20, 21, and 24, and at pages 94 through 106 of Exhibit "A." *See also,* Proposition IV, *supra.*

PROPOSITION VI

THIS COURT SHOULD REJECT AS FRIVOLOUS DEFENDANTS' SUGGESTION THAT THE RELIEF REQUESTED BY DAIFLON BE DENIED BECAUSE THE TRIAL JUDGE HAS YET TO RULE UPON CERTAIN GROUNDS URGED BY DEFENDANTS IN SUPPORT OF THEIR MOTION FOR NEW TRIAL

Defendants conclude their Answer with the astounding proposition that " * * * Daiflon is attempting to avoid any ruling whatsoever on the merits of many of the issues raised by respondents." The basis for this contention is that defendants raise "several grounds" in support of their motion for a new trial, each of which is "wholly independent and sufficient" and that this Court should not assume supervisory jurisdiction, regardless of any other circumstance, with those issues unresolved. (Ans. pp. 38-39). Specifically, defendants state that the court did not act on their claim that Daiflon relied upon damage evidence that "its counsel knew, or should have known was untrue" and further that the court failed to strike the testimony of a certain witness. (*Id.* p. 38). Each of these contentions has been comprehensively answered by Daiflon in its Response to Defendants' Motion for Judgment Notwithstanding the Verdict and for a New Trial. (Exhibit "A," pp. 107-114)

The fact that the district court did not, in its rambling review of the case at the time the new trial was granted, deal with these subsidiary issues does not affect any way the power of this Court to review the issue of whether or not the action which was taken by the district court is characteristic of erroneous practice likely to reoccur upon a second or subsequent retrials. Notwithstanding the foregoing, the assertion that Daiflon, by this Petition, seeks to avoid ruling on these evidentiary issues is incredulous. In this regard, it should be noted that the defendants did not, at or after the time the motion for a new trial was heard and ruled

upon, request further rulings of the court in connection with specific evidentiary issues now identified. Clearly, defendants chose to take the favorable result without further proceedings, prepare for further discovery as authorized by the Court, and wait out the second trial, if in fact one were to occur. The question of the disposition of additional "new trial" issues is merely an afterthought, and presents no bar to this Court's consideration of the issues raised by the Petition.

CONCLUSION

No misstatement of (i) the issues presented; (ii) the background facts of the litigation; or (iii) or the law applicabale to Daiflon's Petition can detract from the devastating nature of the district judge's ruling in connection with the new trial motion. (Pet., Exhibit "A") That order, at best, reflects a total lack of comprehension on the part of the district judge with respect to the matters at issue. At worst, it demonstrates a disposition to try this case a second or a third or a fourth time until a defendants' verdict is achieved. It reflects a distrust of trial by jury in this case.

This case is nearly seven years old. Prior erroneous rulings of the district judge have required Daiflon to present its case to this court, and to the United States Supreme Court. Although no request for additional discovery has been made, the district judge has ordered that such discovery may be undertaken. Daiflon is financially exhausted. The defendants have unlimited funds. The expense to Daiflon, after seven years of litigation, of re-taking depositions all over the country and of re-trying the case is prohibitive. This petition for a writ of mandamus and/or writ of prohibition is a dying gasp by Daiflon for its constitutional right to the jury's verdict and for justice notwithstanding the economic power of the defendants.

Under all the circumstances presented, justice can only be served by the issuance of the writ sought by Daiflon.

Defendants would thereafter have the statutory right of appeal with respect to all issues.

Therefore, this Honorable Court is requested by Daiflon, Inc. to issue a writ of mandamus and/or prohibition as prayed for.

Respectfully submitted,

B. HAYDEN CRAWFORD
JOEL L. WOHLGEMUTH
FRANK GREGORY

By: B. Hayden Crawford
Crawford & Jackson
1714 First National Bldg.
Tulsa, Oklahoma 74103

By: Joel L. Wohlgemuth
Prichard, Norman & Wohlgemuth
1100 Philtower Building
Tulsa, Oklahoma 74103

By: Frank Gregory
1714 First National Bldg.
Tulsa, Oklahoma 74103

Attorneys for the Petitioner,
Daiflon, Inc.

[Attachments deleted in printing.]

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of July, 1979 I mailed a true and correct copy of the foregoing instrument to the following persons:

The Honorable Luther Bohanon
United States District Judge
Western District of Oklahoma
United States Courthouse
Oklahoma City, Oklahoma 73102

Mr. James M. Sturdivant
2010 Fourth National Bank Bldg.
Tulsa, Oklahoma 47119
(Attorney for Kaiser Aluminum & Chemical Corp., and Kaiser Aluminum & Chemical Sales, Inc.)

Mr. Coleman Hayes
1918 First National Center West
Oklahoma City, Oklahoma 73102
(Attorney for E. I. DuPont De Nemours & Co.)

Mr. Ben Burdick and
Mr. D. Kent Meyers
1700 Liberty Tower
Oklahoma City, Oklahoma 73102
(Attorneys for Union Carbide Corp.)

Mr. Peter B. Bradford
100 Park Avenue Building
Oklahoma City, Oklahoma 73102
(Attorney for Pennwalt Corp.)

Mr. John S. Athens
2400 First National Bank Building
Tulsa, Oklahoma 74103

Mr. J. L. Weigand
830 First National Bank Building
Wichita, Kansas 67202
(Attorney for Racon Incorporated)

Mr. Herbert Dym
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(Attorney for E. I. DuPont De Nemours & Co.)

Mr. Henry Kolowrat
1500 Market Street
Philadelphia, Pennsylvania 19102
(Attorney for Pennwalt Corporation)

/s/ Joel L. Wohlgemuth

APPENDIX K

JANUARY TERM — March 5, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable Jean S. Breitenstein, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges

No. 79-1459
DAIFLON, INC.
Petitioner,

vs.

THE HONORABLE LUTHER BOHANON,
Judge of the United States
District Court for the
Western District of Oklahoma,
Respondent.

This matter comes on for consideration of the petition of respondent for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, it is ordered:

1. The petition for rehearing is denied by Circuit Judges McWilliams, Breitenstein and Doyle, the panel to whom the case was argued and submitted.

2. The Clerk having transmitted the suggestion for rehearing en banc to the members of the panel and the judges of the Court who are in regular active service (except Judge William J. Holloway, Jr., who is recused and who did not participate) and no judge in regular active service nor judge who was a member of the panel that rendered the decision sought to be reheard having requested a vote on the suggestion, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

/s/ HOWARD K. PHILLIPS, Clerk

APPENDIX L

Law Offices
CRAWFORD, CROWE & BAINBRIDGE
1714 First National Building
Tulsa, Oklahoma 74103

March 26, 1980

The Honorable Luther Bohanon
United States District Judge
United States Courthouse
Oklahoma City, Oklahoma 73102

Re: Daiflon, Inc. vs. Allied Chemical Corporation, et al., No. C-72-483-B

Dear Judge Bohanon:

This is in response to your letter of March 24th with regard to our request for a conference, and the response by counsel for the defendants that in lieu of the conference with the Court there be a meeting between counsels of the parties "to arrive at an agreed method of progress for this case in the district court". We appreciate your statement in the letter of March 24th that you would wait to hear from plaintiff or defendant counsel as to what further action we wish the Court to take.

After extensive discussion of this matter with our clients, we had hoped to visit with the Court in the presence of defendant counsel about the possibility of the Court voluntarily disqualifying himself in any further proceedings in this matter in accordance with Title 28 U.S.C.A. §455. It is the position of the plaintiff that in view of the proceedings in this matter, and the two appeals to the United States Court of Appeals for the Tenth Circuit, the Court's impartiality may reasonably be questioned. See *Webb v. McGhie*

Land Title Co., et al., 549 F. 2d 1358, 1361 (10th Cir. 1977) *U. S. v. Ritter*, 540 F.2d 459, 464 (10th Cir. 1976), cert. den., 97 S.Ct. 370.

Consequently, it occurred to us that it would be the proper and respectful procedure to discuss this suggestion with the Court in an informal conference.

Very respectfully,

B. HAYDEN CRAWFORD

BHC:kr
cc: All Counsel of Record

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
OF THE
WESTERN DISTRICT OF OKLAHOMA

No. CIV-72-483-B

Daiflon, Inc.,
Plaintiff,

vs.

Allied Chemical Corporation,
et al.,
Defendants.

ORDER

The court has reviewed its notes of the evidence and testimony in the above-entitled cause and the briefs of the parties, and has carefully considered the substance and tenor of the circuit court's opinion in Daiflon, Inc. v. The Honorable Luther Bohanon, No. 79-1459 (10th Cir. Dec. 21, 1979).

The trial court is charged in the aforesaid Opinion of the United States Court of Appeals for the Tenth Circuit (hereinafter Opinion) with perhaps being an advocate in favor of the defendants. The circuit court arrives at this conclusion, in part, by reading between lines.[1] Further, the trial court is charged for oversight in failing to enter a formal order[2] and for not giving sufficient reason for vacating the jury verdict as to the matter of liability.[3] From this perspective, it seems perfectly clear to this court that considerable reason and justification for the granting of the motion can be found in the transcript appended to the

[1]Opinion at 6 and 18.
[2]Opinion at 6.
[3]Opinion at 22.

circuit court's opinion. Clarification of the trial court's reasons, other than given, would have gladly been furnished upon request.

The trial court, in sustaining the defendants' motion for new trial, noted:

(a) that there had not been a fair trial;[4]

(b) that the court confessed error in admitting certain exhibits, to which the court after this period of reflection contends substantially affected the rights of the parties.[5] Said exhibits were not properly identified for admission under Rule 803(6), Federal Rules of Evidence.

The trial court saw and heard all the evidence (approximately four weeks of trial) and had a clear understanding of the evidence and issues before the jury; and based upon what the trial court knew, it had to, in honesty, grant defendants' motion for new trial as to all issues. The court unequivocably stated that to permit the verdict to stand and not grant a new trial, the court would be dishonest and cowardly.[6] What more can a judge say regarding his feeling that a new trial was required? The court observed that if it did not grant a new trial, it would have been exceedingly lazy.[7] What more can a judge say to show his feeling that a new trial was essential for justice to be done in this case?

This court specifically noted that it had no interest in who won or lost the case, but only in seeing that each party was afforded a fair trial, and that the ends of justice were met. This trial court has never in 19 years on the bench ever favored one party over another.

Nor can the court candidly state that its refusal to grant defendants a judgment notwithstanding the verdict (Judgment N.O.V.) should be considered any proof of the

[4]Appendix to Opinion at 4.

[5]Appendix to Opinion at 7.

[6]Appendix to Opinion at 4.

[7]Appendix to Opinion at 5.

liability of the defendants, as urged by the circuit court.[8]

This court is ordered to accept the verdict of the jury as to liability of defendants and to try the case again as to the amount of damages. The district court does not set to review and reverse the judgments of the court of appeals.[9] A district court is required to follow the mandate of a court of appeals and may not take action inconsistent with it.[10]

If this court were to retry the cause on the basis of the mandate, for the reasons hereinbefore stated, it could not be satisfied with the result. The court is passionately convinced that the issue of liability has not been proven, though there exists some evidence otherwise. Further, any verdict of damages must be founded upon a totality of the evidence — including that evidence bearing upon the question of liability.

This court is not moved to any degree by the personal charges made by plintiff counsel in its mandamus action before the circuit court; nor is this court moved by the threats in plaintiff counsel's letter of March 26, 1980. The question of the trial court's bias and prejudice was squarely before the circuit court in the mandamus action, and the request to remove the trial court from this case was denied, or at least not acted upon, distinguishing this case from *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358 (10th Cir. 1977) and *United States v. Ritter*, 540 F.2d 459 (10th Cir. 1976). This court had desired to wait until all appellate issues had been settled before withdrawing, but time did not permit in light of the correspondence of counsel, which is filed with the Clerk of the Court. If this court tried this case again, the provisions of 28 U.S.C.A. §455 and §144 would not be violated, and it is not because of these threats that this court withdraws, but rather because of the mandate.

---

[8]Opinion at 21.

[9]*Lacob v. United States*, 59 F.R.D. 329 (N.D. Ill. 1973)

[10]*Paul v. Archer Daniels-Midland Co.*, 313 F.2d 612 (5th Cir. 1963).

This court respectfully withdraws from this cause and asks to be relieved from all duties in connection therewith. Said withdrawal is not based upon any feelings of prejudice or interest, accusations intimated in the circuit court's opinion and in the charges — pro and con — in the correspondence between counsel and the court. Said request of withdrawal is based wholly upon the reasons herein stated.

IT IS SO ORDERED.

Dated this 7th day of April, 1980.

s LUTHER BOHANON
United States District Judge

APPENDIX N

MAY TERM — JUNE 6, 1980

Before Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein, and Honorable William E. Doyle, Circuit Judges.

No. 79-1459
DAIFLON, INC.,
Petitioner,

vs.

THE HONORABLE LUTHER BOHANON,
Judge of the United States District Court
for the Western District of Oklahoma,
Respondent.

Inasmuch as there is no provision in our Rules for filing of a second petition for rehearing, no action has been taken on the second petition for rehearing filed April 17, 1980.

In order to clear our records, the second motion for rehearing should be and hereby is denied.

/s/ HOWARD K. PHILLIPS, Clerk

Supreme Court, U.S.
FILED
JUL 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1895

IN THE

Supreme Court of the United States

October Term, 1979

ALLIED CHEMICAL CORPORATION, ET. AL.,
Petitioners,

VERSUS

DAIFLON, INC.,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

B. HAYDEN CRAWFORD
1714 First National Bank Bldg.
Tulsa, Oklahoma 74103
JOEL L. WOHLGEMUTH
909 Kennedy Building
Tulsa, Oklahoma 74103
FRANK GREGORY
4107 South 72nd East Avenue
Tulsa, Oklahoma 74145
Attorneys for the Respondent, Daiflon, Inc.

TYPE SERVICE CO., Law Brief Printing Division, 507 S. Quaker, Tulsa, OK 74120 (918) 587-2052

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

Proceedings in the District Court 2

The District Court's Judgment 7

Post-Judgment Proceedings in The District Court 8

The Mandamus Proceeding and Judgment of the Court of Appeals 11

Subsequent Proceedings in the District Court 15

ARGUMENT 16

I. The Court of Appeals for the Tenth Circuit Correctly Determined that the Standard of Review Which it Applied Upon Mandamus to the District Court's New Trial Order was Not in Conflict with the Prior Decisions of this Court 16

II. The Court of Appeals for the Tenth Circuit, in Applying the Clear Abuse of Discretion Standard to the New Trial Order, Followed its Prior Opinions — the Principles of Which are Fully Consistent with the Decisions of Other Circuit Courts of Appeal 28

III. The Exceptional Circumstances Presented by the New Trial Order Support the Considered and Limited Exercise of Discretion by the Court of Appeals for the Tenth Circuit in Reinstating the Jury Verdict as to Liability 33

IV. The Defendants' Contention that the Court of Appeals for the Tenth Circuit Has Made Findings as to the Issue of Liability Upon an Incomplete Record is Plainly Wrong 37

Page

V. The Defendants' Reliance Upon the Post-Mandamus Order of the District Court is Unjustifiable and Constitutes a Misuse of the Certiorari Process 39

CONCLUSION 40

CERTIFICATE OF MAILING 41

TABLE OF AUTHORITIES

CASES

Bankers Life & Casualty Co. v. Holland,
346 U.S. 379, 383 (1953) 18, 19, 20

Borras v. Sea-Land Service, Inc.,
586 F.2d 881, 887 (1st Cir. 1978) 34

Daiflon, Inc. v. Allied Chemical Corp.,
64 F.R.D. 690 (W.D.Okl. 1973) 4

Daiflon, Inc. v. Allied Chemical Corp.,
534 F.2d 221 (10th Cir. 1976), cert. den.,
429 U.S. 886 (1976) 4, 24

Daiflon, Inc. v. Bohanon,
612 F.2d 1249 (10th Cir. 1979) 5

General Motors Corp. v. Lord,
488 F.2d 1096 (8th Cir. 1973) 29, 30, 31

Grace Lines, Inc. v. Motley,
439 F.2d 1028 (2d Cir. 1971) 32

Kerr v. United States District Court
for the Northern District of California,
426 U.S. 394 (1976) 23, 24, 25, 36

La Buy v. Howes Leather Co.,
352 U.S. 249 (1957) 17, 19, 20, 23, 29

Page

Paramount Film Distributing Corp. v. Civic Center Theater, Inc., 333 F.2d 358 (10th Cir. 1964) 17, 28, 29

Prop-Jets, Inc. v. Chandler, 575 F.2d 1322 (10th Cir. 1978) 28

Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) 20, 23

State Farm Mutual Automobile Insurance Co. v. Scholes, 601 F.2d 1151, 1154 (10th Cir. 1979) 28

Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978) 26, 27

Will v. United States, 389 U.S. 90 (1967) 21, 22, 23

STATUTES

15 U.S.C. §§1 and 2 3

28 U.S.C. §455 15

28 U.S.C. §1291 37

28 U.S.C. §1651(a) 11, 17

RULES

Rules of the Supreme Court, Rule 40 2

Federal Rules of Appellate Procedure, Rule 10(d) 12, 38

Federal Rules of Appellate Procedure, Rule 21(a) 11

No. 79-1895

IN THE
Supreme Court of the United States
October Term, 1979

ALLIED CHEMICAL CORPORATION, ET. AL.,
Petitioners,

VERSUS

DAIFLON, INC.,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

The respondent, Daiflon, Inc. ("Daiflon") respectfully submits its brief in opposition to the petition of Allied Chemical Corporation, E. I. DuPont DeNemours & Co., Kaiser Aluminum & Chemical Corporation, Kaiser Aluminum & Chemical Sales, Inc., Pennwalt Corporation, Racon, Incorporated, and Union Carbide Corporation (hereinafter "defendants") that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

QUESTION PRESENTED

The Court of Appeals for the Tenth Circuit determined that the district court, in granting the defendants' motion for a new trial, committed a clear abuse of discretion by overturning the jury verdict as to liability. The question presented upon the present petition for a writ of certiorari is

whether the lower court's decision conflicts or is inconsistent with prior decisions of this Honorable Court and or other federal courts with regard to the proper scope of appellate review under the All Writs Act.

STATEMENT OF THE CASE

The "Statement of the Case" provided by the defendants at pages 3 through 12 of their Petition For a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit (hereinafter the "Petition") is not a fair presentation of the background facts relevant to the issues presented to this Court for review. On the contrary, the statement set forth in the Petition is argumentative in tone, self-serving and highly misleading. Consequently, Daiflon elects, pursuant to Rule 40 of the Rules of this Court, to submit the following statement of the case, which statement is intended to fairly and accurately summarize the historical background considered by the Court of Appeals for the Tenth Circuit, together with that Court's judgment and opinion regarding the propriety of a limited application of supervisory mandamus within the perspective of the record facts therein presented.

Proceedings in the District Court

Daiflon was organized and incorporated in 1969 for the purpose of initially importing refrigerant gas from Japan, repackaging that gas, and reselling it in the non-automotive replacement market. The defendants are the domestic manufacturers of refrigerant gas. During the period 1969-

1972, defendants marketed refrigerant gas in various size cylinders through "full line" air conditioning and heating wholesalers, who then resold the gas (in cylinders) to servicemen and contractors. Daiflon marketed its gas to prospective purchasers regardless of their level in the chain of distribution and, therefore, Daiflon competed directly with defendants for some wholesale accounts, and further competed directly with other of defendants' wholesalers for retail accounts. On March 15, 1971 the defendants reduced the prices of refrigerants by 13%, and in March of 1972 the defendants again lowered prices dramatically (this time only on the two grades of refrigerants sold by Daiflon). Daiflon ceased business operations on October 12, 1972, and the defendants thereafter immediately increased prices to the levels prevailing prior to the first reduction of March 15, 1971.

On July 12, 1972 Daiflon filed a complaint in the district court alleging violation by the defendants of the Sherman Antitrust Act, 15 U.S.C. §§1 and 2. Daiflon contended that the defendants had entered into an unlawful price-fixing conspiracy in order to set prices, temporarily, at a low level to exclude Daiflon from the market in violation of §1 of the Sherman Act, 15 U.S.C. §1. Daiflon further stated that the defendants conspired to monopolize the non-automotive refrigerant gas replacement market, and that the defendant DuPont attempted to, and did in fact, monopolize that market during the period of Daiflon's operations, 1969-1972. The complaint alleged that Daiflon's

losses and the destruction of its business were caused by the defendants' anticompetitive conduct, and that total damages exceeded $3,000,000.00.

In September of 1974 the trial judge, the Honorable Luther Bohanon, dismissed Daiflon's action with prejudice citing to Rule 37(B) (2) (C) F.R.Civ.P. At that time the trial judge determined, without the benefit of a hearing, that Daiflon failed to properly answer one of many interrogatories propounded by the defendants. This failure, reasoned the district court, was inexcusable and entitled the defendants to dismissal, with prejudice, of all claims. *Daiflon, Inc.* v. *Allied Chemical Corp.*, 64 F.R.D. 690 (W.D.Okl. 1974). Upon appeal, the Court of Appeals for the Tenth Circuit reversed the district court's order and judgment of dismissal and remanded the case for trial. *Daiflon, Inc. v. Allied Chemical Corp.*, 534 F.2d 221 (10th Cir. 1976), cert. den., 429 U.S. 886.[1]

Following remand to the district court, the defendants filed a motion for summary judgment under the provisions of Rule 56 F.R.Civ.P. The district court denied the defendants' request for summary judgment, and in March, 1979 (almost three years following the circuit's reinstatement of the case), trial by jury commenced. During the trial, Daiflon called twenty-five witnesses, and approximately 276 of its exhibits were admitted into evidence. The district court excluded approximately 423

---

[1]Defendants' petition for a writ of certiorari was assigned Case No. 76-243 by the Clerk of this Court.

exhibits offered by Daiflon. (The district court's order relating to the admissibility of contested exhibits is included as Appendix "D", Vol. I, p. 000, to this Brief). At the conclusion of the evidence presented by Daiflon, the defendants jointly moved for a directed verdict. In denying the defendants' motion the district court noted that an issue was presented "***for the jury to decide, as I view it at this stage of the trial of this case." (Tr. of Trial Proceedings, March 20, 1979, p. 53.[2]

The defendants then presented their evidence which consisted of the testimony of five live witnesses and the introduction of approximately 100 exhibits. All of the defendants' exhibits, *without exception*, were admitted by the district court. Notwithstanding the fact that the defendants' witness list disclosed approximately twenty live witnesses and fourteen witnesses by deposition, which included various representatives of each of the defendant corporations, no officers or employees of the defendants were called as witnesses at trial, with the exception of a computer programmer employed by the defendant Union Carbide Corporation. The testimony of this witness was

---

[2]The district court made no comment whatsoever upon the denial of the motion for a directed verdict with respect to the evidentiary problems subsequently referred to in the order granting the motion for a new trial. The rulings and comments made by the district court upon the defendants' post-trial motions have been appended by the lower court to their judgment and opinion as Exhibit "A". See *Daiflon, Inc. v. Bohanon*, 612 F.2d 1249, 1261-1262 (10th Cir. 1979). The official report of the circuit court's opinion is hereinafter referred to as the "Mandamus Opinion".

merely for the limited purpose of authenticating a computer print-out, which was subsequently offered and received into evidence as an exhibit.

The defendants, having presented no evidence in connection with Daiflon's claim of loss of profits, loss of capital investment, debt position, or going concern value, concluded their case.[3] The defendants, following brief rebuttal testimony by Daiflon, unsuccessfully renewed their motion for a directed verdict.

On March 29, 1979 the trial judge submitted the case to the jury on a special verdict form which the defendants had requested.[4] The jury deliberated for approximately nine hours over a two-day period and subsequently returned the special verdict with the following findings: That all defendants "inclusive" conspired with each other to violate the federal antitrust laws (Special Verdict, Findings 1 and

---

[3]The Tenth Circuit correctly perceived the trial judge's apparent anguish and dilemma resulting from defendants' last-minute decision not to call any of their representatives as trial witnesses:

> "There is reason to believe that the trial judge was somewhat dissatisfied with the presentation which was made by the defendants in that he felt that this should be changed in the event of a second trial.
>
> The judge is, of course, not in a position of advocacy unless he does hold the view (and this has to be read between the lines) that the court should encourage the development of the defendants' case, he would be acting outside of and beyond his authority. The fact that one side was not prepared to the extent that the court felt it ought to have been is not a basis for the grant of a new trial." (Mandamus Opinion, p. 1258).

[4]"The Special Verdict, in our judgement, accurately reflects the instructions given to the jury." (Defendants' Objections to Plaintiff's Proposed Amendments to Special Verdict, filed March 29, 1979).

2); that DuPont's share of the relevant market during the period 1969-1972 exceeded 50% (Special Verdict, Finding 3); that DuPont had the specific intent to acquire monopoly power and that there was a dangerous probability that it would ultimately do so (Special Verdict, Finding 4); that DuPont had monopoly power during the period 1969-1972 (Special Verdict, Finding 5); that such monopoly power was willfully and unlawfully acquired (Special Verdict, Finding 6); that Daiflon's business and property losses were proximately caused by the defendants' unlawful conspiracy *and* DuPont's individual monopolization efforts (Special Verdict, Findings 7 and 8); that Daiflon proved by a preponderance of the evidence the reasonable value of its business and property losses, and that its evidence was not unduly speculative (Special Verdict, Finding 9); and that the reasonable value of Daiflon's business and property losses was two million five hundred thousand dollars ($2,500,000.00). The Special Verdict is included as Appendix "A" to this brief.

The District Court's Judgment

The Special Verdict of the jury was returned on Friday afternoon, March 30, 1979. On the following Monday, April 2, Daiflon submitted to the district court a proposed judgment to be entered in accordance with the provisions of Rule 58(2) F.R.Civ.P. The proposed judgment is set forth as Appendix "B" to this brief. The judgment was submitted by the clerk of the court to counsel for the defendants for approval as to form. No objection was made by the

defendants. On April 9, 1979 the district court entered its judgment, which essentially followed the provisions of Daiflon's proposed judgment, with the significant exception that the court's judgment awarded Daiflon the sum of $2,500,000.00 rather than the statutory trebled amount of $7,500,000.00. The district court's judgment is set forth as Appendix "C" to this brief.[5]

Post-Judgment Proceedings
In The District Court

On April 12, 1979 Daiflon filed a motion to include treble damages and judgment pursuant to 15 U.S.C. §15 together with a supporting memorandum brief. The defendants did not respond to the motion, and no action on the motion was taken by the district court.

Within the time allotted by Rules 50 and 59 F.R.Civ.P. the defendants moved for judgment notwithstanding the verdict and for a new trial. Daiflon filed a responsive brief to the post-trial motions, a copy of which is included as Appendix "E" to this brief. A hearing was held on May 14, 1979 to consider the defendants' motions at which time the district court heard the arguments of counsel. Thereafter, the trial judge orally delivered his order denying the motion for judgment n.o.v. and granting the motion for new trial. The district court initially concluded that it could not "***under any circumstances, grant judgment NOV, it just would not fit this case at all." (Mandamus Opinion, p. 1261)

[5]The court did not circulate its judgment to counsel for Daiflon or defendants for comment or approval as to form.

However, the trial judge indicated that the jury verdict must be vacated in its entirety and a new trial granted. The first reason advanced in support of the district court's action involved the effectiveness of Daiflon's lead trial counsel, B. Hayden Crawford:

> I say this to you, Mr. Crawford, you are an exceedingly good lawyer, and you make a lot of things that are really not important, as I view it from the evidence; but you had this jury in the palm of your hand almost from the beginning." *Id.*

The district court thereafter chronicled problems which it and the defendants had purportedly encountered as a result of Daiflon's alleged failure to comply with pre-trial orders relating to the introduction of exhibits.[6] *Id.*, pp. 1261-1262. It is interesting to observe that the trial judge did not, in his new trial order, specify which, if any, of Daiflon's exhibits were improperly received. (See Mandamus Opinion, p. 1259 for the Circuit Court's Comments regarding this issue).

The trial judge then noted his "***full and complete appreciation for the work of the jury in this case, and full regard for their stability in the solving of matters of this kind ..." Nevertheless, the district court observed that the case is

---

[6]Daiflon's position as to its compliance — and the defendants' default — with the district court's pre-trial orders is set forth in detail in the following appendices to this Brief: Plaintiff's Response to Defendants' Motion for Judgment Notwithstanding Verdict and for new Trial, App. "E", pp. 120a-134a; Petition for Writ of Mandamus and/or Writ of Prohibition, App. "F", pp. 158a-163a; Reply of Petitioner to Respondent's Answer to Petition for Writ of Mandamus and/or Writ of Prohibition, App. "J", pp. 355a-364a.

not an easy kind of a case for a jury since "***the issues are completely foreign to them. They don't understand about this gas business. After weeks of work they get to where they do." *Id.*, p. 1262

The trial judge then turned to the damage question, and indicated his dissatisfaction with the jury award:

> "When you consider the verdict, two and a half million dollars - when you consider that this company started out with a capital investment of $200,000.00 to get into a business that runs into the millions, it would be just like me going out there and saying, 'I am going to go into the oil business, and I am going to get a block and drill a well, on $100,000.'
>
> Why, you couldn't even get started.
>
> The $200,000.00 that the plaintiff had wasn't enough to really get them started into breaking into this business, as long as the defendants were concerned about their business."[7] *Id.*

The district court then observed that the defendants "***had a perfect right to meet competition, and for them not to meet competition is to deny them free enterprise." The district judge then indicated his concern with regard to the trebling requirements of the antitrust laws:

---

[7]While the Court of Appeals for the Tenth Circuit did not vacate the new trial order relating to damages, it did recognize the district judge's erroneous findings with regard to critical facts underlying the damage award:

> "His main reason is stated as his next point in the informal findings, that the verdict of $2.5 million indeed was excessive inasmuch as the original capital investment was only $200,000.00. It should be said at this time that the trial court was not correct in this statement because the actual initial capital was $300,000.00 together with a very substantial line of credit amounting to approximately $500,000.00." (Mandamus Opinion, pp. 1258-1259)

> "Now the Act provides that where you find a conspiracy, and it is operation, why, for punishment the Court adds, triples it; but you can't say there's two and a half million dollars in damages from the years 1969, 1970 and 1971 operation." *Id.*, pp. 1262-1263.

The district judge thereafter proceeded to outline the procedures which it desired to follow with regard to the admissibility of exhibits prior to the second trial, and stated that he intended to allow "***a fixed time for further discovery."[8] *Id.*, p. 1263. The district court concluded:

> "Well, the Court is absolutely not satisfied with it. The verdict of the jury, the Court, was shocked when the verdict was read of two million five hundred thousand based upon the evidence before that jury, just does not justify that kind of a verdict." *Id.*

The Mandamus Proceeding and Judgment of the Court of Appeals

Less than two weeks following the new trial order, Daiflon filed a Petition for Writ of Mandamus and/or Writ of Prohibition with the Court of Appeals. (The petition is included as Appendix "F" to this brief.) Daiflon requested that the appeals court assume jurisdiction under the All Writs Act, 28 U.S.C. §1651, as implemented by Rule 21(a) of the Federal Rules of Appellate Procedure, and issue a writ of mandamus, or in the alternative a writ of prohibition to the district court directing the respondent judge to

---

[8]It is not clear exactly what the district court had in mind with regard to additional discovery. At the time of the new trial order the case had been pending for nearly seven years, and no request had been made for further discovery.

reinstate the special verdict of the jury and enter judgment thereon as required by law, set a hearing for determination of a reasonable attorneys' fee to be included in the judgment, and prohibiting the respondent judge from proceeding further relative to the order for a new trial. The Court of Appeals received a responsive brief from the defendants and on August 10, 1979 entered an order directing the parties[9] to prepare and sign a narrative statement of the case "***along the lines provided in Rule 10(d) of the Rules of Appellate Procedure. Each side shall prepare a summary of the evidence presented by it at the trial. These summaries shall be simultaneously prepared and shall be simultaneously submitted on or before September 11, 1979." (The order of August 10, 1979 is included as Appendix "G" to this Brief.) Pursuant to the order and directive of the Court of Appeals Daiflon and the defendants simultaneously filed their narrative statements of the case.[10] (The respective narrative statements of Daiflon and the defendants have been included as Appendices "H" and "I" to this Brief.)

On December 21, 1979 the Court of Appeals entered

---

[9]The district judge, by letter dated May 30, 1979 to the Clerk of Court of Appeals for the Tenth Circuit, indicated that he had received Daiflon's petition and stated that he would make no appearance in the case.

[10]It should be noted here that the defendants did not, in the mandamus proceeding, present any objection whatsoever to the procedure established by the appeals court with regard to the filing of narrative statements of the case. This fact is important in view of the arguments now advanced by defendants with regard to the impropriety of the lower court's August 10 order. (See Defendants' Petition, p. 8 [fn. 9] and pp. 24-25.)

the judgment which the defendants now seek to have this Court review by certiorari. In summary, the appeals court concluded that Daiflon had discharged its burden of demonstrating that the district court's new trial order as to liability was "***so extraordinary as to evidence arbitrariness and a clear abuse of discretion." (Mandamus Opinion, p. 1251) The Court of Appeals thoroughly reviewed the trial court's comments in connection with its ruling on the defendants' post-trial motions and concluded that "***there is no rational basis furnished for granting a new trial other than the magnitude of the verdict." *Id.*, p. 1259. The Court of Appeals continued:

> "On the subject of liability, this is not a case in which the evidence to establish liability is vague and questionable. The evidence supported the conclusion that the several defendants engaged in a 'buccaneering' scheme designed to eliminate the plaintiff as a contender. To be sure, Daiflon's market share was relatively small, but the price manipulation and the timing lends itself to the interpretation that elimination of Daiflon was an object of the conspiracy. Defendants lowered their prices by 13%, thus foregoing substantial profits.
>
> * * *
>
> The trial judge offered no rational basis for invaludating the jury verdict in its entirety. He pointed out no particular error in law or in the receipt of evidence. He appeared to have ordered a new trial primarily because he was shocked with the size of the verdict. By so doing, the trial court invaded the provence of the jury as the primary trier of fact..." (citations omitted) *Id.*, pp. 1259-1260.

The Court of Appeals comprehensively discussed prior decisions of this Honorable Court and of other circuit courts of appeal with regard to the exception allowing appellate review of otherwise interlocutory orders by extraordinary writ, and stated that it was "***convinced that a case has been made here for review by supervisory mandamus on the issue of liability of the defendants to the plaintiff-petitioner." *Id.*, p. 1260. The appeals court ordered that the trial court reinstate the jury verdict insofar as it determines the defendants to be liable and directed the trial court to proceed to retry the damage part of the case. In this connection, the Court of Appeals noted that, upon the damage retrial, the trial court should carefully consider certain evidence of Daiflon which had been previously excluded, to-wit: Daiflon's plans to construct a domestic refrigerant gas manufacturing facility.[11]

The defendants subsequently filed a petition for rehearing and suggestion for rehearing en banc which was denied.[12] Thereafter, within the time provided by the Rules of this Court, the defendants filed their petition for a writ of certiorari.

---

[11]Daiflon's contention with respect to the trial judge's error in excluding relevant evidence pertaining to this issue is amplified in Appendix "F", its mandamus petition, at pp. 173a-175a. (See also Daiflon's Narrative Statement of the Case, Appendix "H", pp. 205a-206a.)

[12]The order of the Tenth Circuit denying the petition for rehearing and suggestion for rehearing en banc is included as Appendix "K" to this Brief.

Subsequent Proceedings in the District Court

On March 26, 1980, with the petition for certiorari pending (no stay order had been requested by defendants), counsel for Daiflon requested by letter an informal conference with the district court to discuss the possibility of the court's voluntary disqualification from further proceedings in accordance with 28 U.S.C. §455. In that letter Daiflon's counsel stated that it was the position of the plaintiff that "***in view of the proceedings in this matter, and the two appeals to the United States Court of Appeals for the Tenth Circuit, the Court's impartiality may reasonably be questioned. See *Webbe v. McGhie Land Title Co., et al.*, 549 F.2d 1358, 1361 (10th Cir. 1977); *U.S. v. Ritter*, 540 F.2d 459, 464 (10th Cir. 1976), cert. den., 97 S.Ct. 370." (The letter of March 26 is included as Appendix "L" to this Brief.)

On April 7, 1980 the district court filed an order which essentially represents a criticism of the Mandamus Opinion and indicated that the trial court is "***passionately convinced that the issue of liability has not been proven, though there exists some evidence otherwise." (The order of April 7 is included as Appendix "M" to this Brief.) The district court, following certain gratuitous observations with regard to the alleged "personal charges" and "threats" of plaintiff's counsel in the mandamus action and in its letter of March 26, 1980, proceeded to withdraw from the case and requested that it "***be relieved from all duties in connection therewith." (App. "M", p. 378a)

Following the filing by the trial judge of his order of April 7, 1980 the defendants filed what was styled as a "Second Petition for Rehearing", bringing to the appeal court's attention the recent withdrawal action taken by the trial judge. Essentially, the premise of the Second Petition for Rehearing was that the district judge had disclosed his rationale with regard to the granting of the motion for a new trial, and had indicated that he was convinced that no case had been made by Daiflon as to liability. Therefore, the defendants argued, the Court of Appeals operated upon an incorrect assumption with respect to the trial court's findings and conclusions in the new trial order. On June 6, 1980 the Court of Appeals, recognizing that there is no provision in the rules for the filing of a second petition for rehearing, declined to take any action thereon and determined that the petition should be denied in order to clear the court's records. (The order of the Court of Appeals for the Tenth Circuit denying the Second Petition for Rehearing is included as Appendix "N" to this Brief.)

ARGUMENT

I. THE COURT OF APPEALS FOR THE TENTH CIRCUIT CORRECTLY DETERMINED THAT THE STANDARD OF REVIEW WHICH IT APPLIED UPON MANDAMUS TO THE DISTRICT COURT'S NEW TRIAL ORDER WAS NOT IN CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT.

The central thesis of the defendants' application for

certiorari is set forth at page 13 of their Petition:

> "***the Court of Appeals determined the previously well-settled, black-letter proposition that a new trial order is interlocutory in nature and not appealable under the final judgment rule. ***This use of the writ of mandamus, to review a discretionary determination of a trial court, is in direct conflict with decisions of this Court and of other courts of appeals announcing and applying rigorous criteria to govern mandamus."

This is essentially the same posture assumed by the defendants in the mandamus proceeding - the fallacy of which was addressed at the outset by the Court of Appeals:

> "The defendants take the position that there is no remedy under an extraordinary writ. The only possibilities, according to them, are, first, to grant their motion for judgment notwithstanding the verdict, or, second, to retry the case. Defendants do not give recognition to possible use of the writ on the basis of a 'clear abuse of discretion, an abdication of the judicial power.' *Paramount Film Distributing Corp. v. Civic Center Theater, Inc.*, 333 F.2d 358, 361 (10th Cir. 1964), citing *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed. 2d 290 (1957). The truth is that the extraordinary remedy route is limited, but it cannot be said to be nonexistent." (Mandamus Opinion, p. 1253).

The All Writs Act, 28 U.S.C. §1651(a) provides as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The dispositive inquiry, therefore, is "***whether the

circumstances here are agreeable to the usages and principles of law." (Mandamus Opinion, p. 1254) In making that determination, it is necessary to consider, as the Court of Appeals did in the Mandamus Opinion, the guidance which this Court has historically provided with regard to the propriety of the supervisory use of the extraordinary writ of mandamus. In 1953 this Court interpreted the Congressional policy underscoring the application of the All Writs Act:

> "In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in *De Beers Consolidated Mines v. United States,* 1945, 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566." *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953)[13]

---

[13]In *Bankers Life* it was determined that the application presented was insufficient, under the court's prior decisions, to warrant the application of the extraordinary writ of mandamus. That case involved a treble damage action under 15 U.S.C. §15 which permits suit "in any district court of the United States in the district in which the defendant resides or is found or has an agent ***". The Georgia Insurance Commissioner, one Cravey, was not a resident of the Southern District of Florida (the trial forum), but was alleged to be a member of a conspiracy which carried on illegal business in that district. The district judge determined that the court had jurisdiction of the action, but that venue was not properly laid and ordered the action as to Cravey severed and transferred to the Northern District of Georgia where Cravey resided. The writ of mandamus requested the Fifth Circuit to compel the district judge to vacate and set aside the order of

(Footnote continued next page)

It is interesting to note that the defendants, in their petition for certiorari, cite *Bankers Life* on two separate occasions for the proposition that the petitioner for mandamus must show that his right thereto is "clear and indisputable". (Pet., pp. 16, 19) That proposition is, of course, uncontested by Daiflon, and was given full recognition by the Court of Appeals. (Mandamus Opinion, p. 1254) The defendants have, however, failed to disclose with regard to *Bankers Life* this Court's express recognition of the "clear abuse of discretion" standard of review. 346 U.S. at 383. This is the specific standard applied by the Court of Appeals in connection with its decision upon Daiflon's petition for mandamus.[14]

In *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957)

(Footnote continued from previous page)

severance and transfer. This Court affirmed the court of appeals; dismissal of the petition for mandamus, recognizing that Congress by 15 U.S.C. §15 placed definite limits on venue and civil treble damage actions:

> "Certainly Congress realized in so doing that many such cases would not lie in one district as to all defendants, unless venue was waived. It must, therefore, have contemplated that such proceedings might be severed and transferred or filed in separate districts originally. Thus petitioner's theory has all the earmarks of a frivolous, albeit, ingenious attempt to expand the statute." 346 U.S. at 384.

Accordingly, the petitioner's right to mandamus was not "clear and indisputable".

[14]"In summary, in order to grant relief, an appellate court must find not only that the trial judge's grant of a new trial was erroneous, but also that the judge's conduct of the litigation was such as to raise a conclusion that the judge clearly abused the discretion and that appeal is not an adequate remedy under the circumstances. (Mandamus Opinion, p. 1258).

this Court affirmed the power of the Court of Appeals for the Seventh Circuit to issue a writ of mandamus compelling a district judge to vacate an order transferring the trial of a case to an unsupervised master. In so holding, the Supreme Court reaffirmed its holding in *Bankers Life* that relief under the All Writs Act "***is meant to be used only in the exceptional case where there is a clear abuse of discretion or 'usurpation of judicial power'***". 352 U.S. at 257, citing *Bankers Life & Casualty Co. v. Holland,* 346 U.S. at 383 (1953).

This Court, seven years following the decision in *La Buy,* again indicated that a writ of mandamus may be "appropriately issued where there is a 'clear abuse of discretion'." *Schlagenhauf v. Holder,* 379 U.S. 104, 110 (1964.)[15] This Court's recognition of the abuse of discretion standard in *Schlagenhauf* is expressly predicated upon the prior decision with regard to this issue in *Bankers Life.* 379 U.S. 104, 110, citing *Bankers Life & Casualty Co. v. Holland,* 364 U.S. at 383. Accordingly, *Bankers Life, La Buy* and *Schlagenhauf* support, without exception, the precise standard for review adopted by the Court of Appeals for the Tenth Circuit in the Mandamus Opinion.[16]

---

[15]Defendants have apparently overlooked *Schlagenhauf* in connection with their review of Supreme Court cases pertaining to supervisory use of mandamus under the All Writs Act. It is not cited or otherwise referred to in the Petition.

[16]The Mandamus Opinion, unlike defendants' petition, fairly and thoroughly treats each of these cases. (Mandamus Opinion, pp. 1254-1255).

In 1967 the Supreme Court decided *Will v. United States,* 389 U.S. 90, (1967). This case has considerable importance with regard to the defendants' contention that the standard applied by the Court of Appeals in the Mandamus Opinion, and the court's logic in that opinion, conflicts with the decisions of this Court. In *Will v. United States* the defendant in a criminal proceeding filed a motion for a bill of particulars, containing thirty requests for information. With respect to one of defendant's requests, which sought information concerning oral statements of the defendant relied upon by the government to support the charge in the indictment, the district court ordered the government to furnish the defendant with such information. The United States Attorney declined to do so on the ground that the defendant's request constituted a demand for a list of the prosecution witnesses and that the trial judge lacked authority under Rule 7(f) of the Federal Rules of Criminal Procedure to require the production of such a list. The district court indicated its intention to dismiss the indictment in view of the government's refusal to comply with the court's order. However, before the order of dismissal was entered, the government obtained, on an *ex parte* basis, a stay from the Court of Appeals for the Seventh Circuit of all proceedings in that case. The Court of Appeals also granted the government leave to file a petition for writ of mandamus and issued a rule to show cause why a writ should not issue to compel the trial judge to strike the subject request from the bill of particulars

order. Thereafter, the Court of Appeals for the Seventh Circuit denied the writ. However, the government petitioned for reconsideration, and the Court of Appeals, without taking new briefs or hearing oral argument, reversed itself *and without opinion* issued a writ of mandamus directing the trial judge to vacate his order. This Court in granting certiorari and vacating the writ, observed that while the writ serves a "vital corrective and didactic function" in the federal system, such an objective could not be subserved "***without findings of fact by the issuing court and some statement of the court's legal reasoning." 389 U.S. at 107. This Court continued:

> "A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which the Government rests its attempt to justify the action below.
>
> * * *
>
> What might be the proper decision upon a more complete record, supplemented by the findings and conclusions of the Court of Appeals, we cannot and do not say." *Id.*

Two aspects of *Will v. United States* are especially relevant to the pending application of the defendants. *First,* the opinion of the Court of Appeals for the Tenth Circuit in the case *sub judice* fulfills those requirements which this Court found to be deficient in *Will.* The Court of Appeals analyzed, in considerable detail, the findings and conclusions of the district court within the perspective of the record presented. Here, the Court of Appeals, unlike the

Court of Appeals for the Seventh Circuit in *Will*, extensively reviewed all relevant federal court precedents, formulated the proper standard of review to be applied under the All Writs Act, and applied that standard to the specific facts as found by the Court of Appeals in this case. *Second*, the opinion in *Will* acknowledges the supervisory aspect of mandamus which is so critical to the inquiry presently before this Court, to-wit: that it serves a "vital, corrective and didactic function", recognizing that "***these aims lay at the core of this Court's decisions in *La Buy* and *Schlagenhauf* . . . " 389 U.S. at 107. Consequently, it is clear from *Will v. United States* that the Court's prior decisions in regard to the proper utilization of the extraordinary writ of mandamus (*La Buy* and *Schlagenhauf*) remain viable.

In *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394 (1976) this Court reiterated that the petitioner for mandamus must satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable' ". 426 U.S. at 402.[17] Moreover, in *Kerr* it was stated that "***it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." (citations omitted). 426, U.S. at 402. Certainly, that principle is of fundamental significance to the matter

[17]This, of course, was recognized by the Court of Appeals for the Tenth Circuit in the Mandamus Opinion, and the court therein determined that Daiflon's right to such a writ was in fact "clear and indisputable". (Mandamus Opinion, pp. 1254, 1255, 1260).

presently before this Court. The Court of Appeals for the Tenth Circuit has, on two occasions, reviewed the conduct of the Honorable Luther Bohanon, District Judge, in connection with his most severe rulings against Daiflon. On the first occasion, the Court of Appeals determined that the trial judge committed reversible error in imposing the "drastic sanction of dismissal for Daiflon's failure to properly answer (in the trial court's opinion), a single interrogatory.[18] *Daiflon, Inc. v. Allied Chemical Corp.*, 534 F.2d 221 (10th Cir. 1974), cert. den., 429 U.S. 886 (1976). On the second occasion, involving the order which gave rise to the Mandamus Opinion, the trial judge wholly disregarded the comprehensive findings of fact entered by the jury after a lengthy trial, and without rational basis, granted a new trial on all issues. The Court of Appeals acted not only on full briefs and argument, but on narrative statements of the case presented by the parties. The action of the Court of Appeals which the defendants now seek to review was in a large part a matter of discretion exercised within the realm of that Court's thorough review of the facts of the case and the law applicable to those facts. See *Kerr*, 426 U.S. at 402.

Finally, the *Kerr* case is unquestionably relevant to the issues before this Court by virtue of the following observation contained in that opinion:

> "More importantly, particularly in an era of excessively crowded lower court dockets, it is in the

[18]The Court of Appeals, in the Mandamus Opinion, refers to Judge Bohanon's 1974 dismissal order as being for a "trivial reason". (Mandamus Opinion, p. 1251)

> interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed ... until after final judgment has been rendered by the trial court." (citations omitted) 426 U.S. at 402.

Within the context of this case, the action taken by the Court of Appeals with respect to the limited utilization of the writ of mandamus to correct the trial court's clear abuse of discretion is fully consistent with this Court's comments in *Kerr* pertaining to the "final judgment" rule. That is, under the ruling of the district judge (assuming that Daiflon's petition had been denied) a new trial on all issues would have proceeded. Attendant to the trial would be, as indicated by the district court in his rulings upon the motion for new trial, further discovery on all issues. Following that discovery and retrial, the parties would have the right to appeal the district court's judgment, and Daiflon would have the concomitant right to appeal from the district court grant of a new trial subsequent to the first trial.[19] The action taken by the Court of Appeals on Daiflon's writ of mandamus merely serves to expedite disposition of all issues - without depriving the parties of their right to full appellate review. The trial judge's plans for additional discovery preceding the second trial have necessarily been limited by the opinion of the Court of Appeals. Moreover, the nature

---

[19]At that juncture the defendants would also have the right to appeal from the district court's denial, following the first trial, of their motion for judgment notwithstanding the verdict.

and extent of the second trial, since it will relate to damages only, has likewise been restricted. Nevertheless, following that trial, the parties will have the right to seek appellate review with respect to the propriety of the district court's ruling in connection with the first judgment. Therefore, the limited use of mandamus in this case encourages "the fair and prompt administration of justice" and does not contribute in any matter whatsoever to the promotion of "piecemeal litigation".

The defendants place heavy reliance on the recent decision of this Court in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978) in support of the proposition that: "Fairly read, *Will v. Calvert Fire Insurance Co.* does not support use of an 'abuse of discretion' standard on mandamus." (Petition, p. 18) That case has been specially dealt with by the Court of Appeals in the Mandamus Opinion. (Mandamus Opinion, p. 1255) As the court there pointed out, *Will v. Calvert Fire Insurance* reversed the decision of the Court of Appeals for the Seventh Circuit granting a writ of mandamus to overturn a district court's stay of federal court proceedings pending the completion of state court litigation. This Court held that a determination as to whether to defer to a state court proceeding was within the district court's discretion and under such circumstances it could not be concluded that the right to a writ was "clear and indisputable":

> "There are sound reasons for our reiteration of the rule that a district court's decision to defer proceedings because of concurrent state litigation is generally

> committed to the discretion of that court. No one can seriously contend that a busy federal trial judge, confronted both with competing demands on his time for matters properly within his jurisdiction and with inevitable scheduling difficulties because of the unavailability of lawyers, parties and witnesses, is not entrusted with a wide latitude in setting his own calendar.
>
> * * *
>
> Where a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable' ". 437 U.S. 665, 666.

Therefore, *Will v. Calvert Fire Insurance Co.* makes it very clear that "[p]lain abuse of discretion or abuse of power which add up to mere erroneousness [does not] furnish a basis for interlocutory review by writ." (Mandamus Opinion, p. 1255). The Court of Appeals in this case proceeded upon that specific assumption:

> "Granted that erroneousnes does not constitute a valid ground for issuance of the writ. Nevertheless, it cannot be said that the clear abuse of discretion standard is repudiated. So, therefore, if it is found that there is a disregard for proper procedure, or misuse of judicial power in the trial judge's conduct, this would constitute a clear abuse of discretion." *Id.*

Clearly, it is not fair or proper to conclude, as the defendants have, that the Supreme Court cases pertaining to supervisory mandamus prescribe a standard other than that applied by the Court of Appeals in this case. The Court of Appeals has considered each of the decisions of this Court which the defendants addressed both before the Court of

Appeals and here, and has fairly and properly concluded that the clear abuse of discretion standard applicable to the new trial order of the district court is viable and proper.

II. THE COURT OF APPEALS FOR THE TENTH CIRCUIT, IN APPLYING THE CLEAR ABUSE OF DISCRETION STANDARD TO THE NEW TRIAL ORDER, FOLLOWED ITS PRIOR OPINIONS - THE PRINCIPLES OF WHICH ARE FULLY CONSISTENT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

At pages 1255 through 1258 of the Mandamus Opinion, the Court of Appeals extensively reviewed prior decisions of the Court of Appeals for the Tenth Circuit and other courts of appeal with regard to the proper use of supervisory mandamus under the All Writs Act. Three salient points emerge:

1. There is no question but that previous decisions of the Court of Appeals for the Tenth Circuit are fully consistent with the Mandamus Opinion. See *State Farm Mutual Automobile Insurance Co. v. Scholes,* 601 F.2d 1151, 1154 (10th Cir. 1979); *Prop-Jets, Inc. v. Chandler,* 575 F.2d 1322 (10th Cir. 1978); *Paramount Film Distributing Corp. v. Civic Center Theater, Inc.,* 333 F.2d 358 (10th Cir. 1964). For example, in *Paramount Film,* the Court of Appeals for the Tenth Circuit specifically noted that the writ of mandamus there (which involved discovery matters) should only issue "***under exceptional circumstances

which amount to a clear abuse of discretion, an abdication of the judicial function, or the usurpation of judicial power." 333 F.2d at 361. *La Buy v. Howes Leather Co.* is cited as authority.[20]

2. The Court of Appeals for the Tenth Circuit discusses, in some detail, the decision of the Court of Appeals for the Eighth Circuit in *General Motors Corp. v. Lord*, 488 F.2d 1096 (8th Cir. 1973). In that case the Court of Appeals for the Eighth Circuit delineated certain circumstances in which review by mandamus is appropriate. There the Court of Appeals stated the general rule that the grant of a new trial *without more* is insufficient to justify the use of the writ.[21] The defendants, in their petition, describe *General Motors Corp. v. Lord* as involving "***a case, *like the present*, involving a request for mandamus to overturn a new trial order based on erroneous admission of evidence." (emphasis supplied, Petition, p. 20) Contrary to the defendants' assertions, the facts of *Lord* make that case inapposite to the matters involved here. In that case the jury returned a verdict for the defendant General Motors ("GM") finding that GM's refusal to renew a franchise with the plaintiff was not improper. The plaintiff sought a new

[20]The Court of Appeals for the Tenth Circuit in *Paramount Film* determined, on the facts present there, that the petitioner did not demonstrate that the trial judge's order (which involved production of documents under Rule 34), constituted a clear abuse of discretion. The writ was denied.

[21]The Court of Appeals for the Tenth Circuit, in the Mandamus Opinion, agreed: "We are, of course, constantly aware of that." (Mandamus Opinion, p. 1257)

trial on the basis of the trial court's commission of allegedly prejudicial error in allowing testimony relative to the misrepresentations of the financial condition of the company, the out-of-trust condition of the company, and irregularities in the financial records of the company. A new trial was granted, and GM petitioned for mandamus on the bases of abuse of discretion and lack of jurisdiction with respect to the new trial order. The court in *Lord* determined that the essential question addressed by the trial court was no different than any other evidentiary issue which trial judges decide in the course of granting motions for new trial, and to grant the extraordinary relief would abrogate the final judgment rule. *Id.*, p. 1100. The court then concluded:

> "The resolution of this question at this time would have little impact on the administration of justice generally and, since it is clear that the trial court had jurisdiction to act, mandamus is clearly inappropriate."

There are substantial and fundamental differences between the circumstance of *Lord* and the case at bar:

(a) In *Lord*, unlike this case, specific and legally sufficient grounds were outlined by the trial judge in support of his order granting a new trial; that point was not at issue. *Id.*, p. 1100.

(b) The order under attack in *Lord* could not be deemed to be characteristic of an erroneous practice likely to recur.

(c) *Lord* did not involve an action which the district court had previously dismissed with prejudice, thereby

requiring the party to seek and obtain relief with the Court of Appeals years prior to the filing of the write.

(d) The order granting a new trial in *Lord* did not reflect the disposition of that trial judge to embark upon the course of conduct which would be inconsistent with the verdict winner's right to fair treatment upon the second trial.

(e) There was no evidence in *Lord* of statements by the trial judge which reflected an attitude and approach to the litigation inconsistent with the rights of the petitioner there to a fair trial.

(f) The record in *Lord* did not reflect grievious errors committed at trial against the verdict winner which were likely to recur upon retrial.

(g) The district court here refused to act, following the jury verdict, in accordance with the clear mandate of a federal statute (refusal to award threefold damages, 15 U.S.C. §4); no such error was alleged or commited in *Lord*.

(h) The trial judge in *Lord* did not indicate that the second trial would only proceed following additional discovery, of undetermined length.

In any event, the law applied by the court in *Lord* is not in conflict with the law applied by the Court of Appeals for the Tenth Circuit in Daiflon - the results reached by the circuit courts differ only because they are different cases based on different facts.

3. The court of Appeals for the Tenth Circuit discusses the opinion of the Court of Appeals for the Second Circuit

in *Grace Lines, Inc. v. Motley*, 439 F.2d 1028 (2d Cir. 1971). There, a writ of mandamus was issued to reinstate a jury verdict which had been vacated upon a motion for new trial. The trial court had ordered a new trial three days after declaring a mistrial; accordingly, the Court of Appeals for the Second Circuit determined that there was a misuse of the Rules of Civil Procedure which precluded the defendants' use of Rule 50(b) F.R.Civ.P. for judgment notwithstanding the verdict. This constituted a violation by the trial judge of Rule 50(b). Granting mandamus, the Court of Appeals for the Second Circuit acknowledged the "clear abuse of discretion" standard:

> "This is not to say that supervisory mandamus is intended, or can be used, to authorize the indiscriminate use of prerogative writs as a medium for reviewing interlocutory orders. Mandamus will lie, in the sound discretion of the appellate court, where the trial court has exceeded or wrongfully refused to exercise its judicial power or has committed a clear abuse of discretion." 439 F.2d at 1031, fn. 2.

In their petition for mandamus, the defendants treat the opinion in *Grace Lines* with that lack of proper regard which they apparently reserve for those judicial decisions which are inconsistent with their theory of the case. While *Grace Lines* is discussed in some length by the Court of Appeals in the Mandamus Opinion (pp. 1257-1258), the defendants only mention the case in passing at the end of their footnote 16 at page 19 of the Petition. They describe the *Grace Lines* decision as holding that "***certain aspects of the new trial order violated Rule 50(b) of the Federal

Rules of Civil Procedure and that the court therefore had 'exceeded judicial power' ***in ordering a new trial". (Petition, p. 19, fn. 16) The defendants neglect to state, for whatever reason, that the Court of Appeals for the Second Circuit specifically recognized the "clear abuse of discretion" standard as a proper basis for the use of the extraordinary writ of mandamus in regard to the review of new trial orders. 439 F.2d at 1031, fn. 2.

III. THE EXCEPTIONAL CIRCUMSTANCES PRESENTED BY THE NEW TRIAL ORDER SUPPORT THE CONSIDERED AND LIMITED EXERCISE OF DISCRETION BY THE COURT OF APPEALS FOR THE TENTH CIRCUIT IN REINSTATING THE JURY VERDICT AS TO LIABILITY.

The Court of Appeals concluded its review of the law applciable to Daiflon's petition by holding that, in order to grant the relief sought, the Court of Appeals must find (i) that the district court's grant of a new trial was erroneous, (ii) that the judge's conduct of the litigation was such as to raise the conclusion that he clearly abused his discretion; (iii) and that appeal is not an adequate remedy under the circumstances. (Mandamus Opinion, p. 1258).[22] To make this determination, the Court of Appeals undertook to analyze the trial judge's rulings and comments (fully set

[22]The Court of Appeals determined at the outset that Daiflon had the burden of showing that its right to the writ was "clear and indisputable". (Mandamus Opinion, p. 1254, 1255)

forth in the Mandamus Opinion at pp. 1261-1263) in relation to the principle that in our judicial system the jury, not the trial judge, is the primary trier of fact:

> "[I]t has long been the rule that a trial judge should not act merely as a '13th juror' and set a verdict aside simply because he would have reached a different result had he been the trier of fact. Rather, the judge's duty is to exercise a more limited judicial discretion ... A trial judge is not to interfere with the verdict, 'unless it is quite clear that the jury has reached a seriously erroneous result."

See *(Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978), cited with approval in the Mandamus Opinion, p. 1260. The Court of Appeals noted that the trial judge did attempt to provide a rationale for the "excessive" jury award - even though that rationale was clearly based upon incorrect statements regarding the evidence presented. (Mandamus Opinion, pp. 1258-1259) The Court of Appeals stated that "***the cases teach us that subject only to the limitation of the Seventh Amendment the trial court's discretion is most full and complete when the court is considering a factual question as to damages." (citations omitted) *Id.*, p. 1259. Therefore, the Court of Appeals was unwilling, despite the argument of Daiflon, to vacate the district court's determination based upon possible erroneous premises which the district court acted upon in connection with the damage issue "***because the trial court did hear the evidence in its entirety and hence it is in a much better position to judge this issue that is an appeallate court." *Id.*, p. 1260.

By the same reasoning, the lower court noted that it was "***apparent that it is the amount of the verdict rather than any other factor which caused the judge to enter the order for new trial." *Id.*, p. 1259. The "clear abuse of discretion" committed by the trial court was that there was *no rational basis* offered by the judge for his invalidation of the jury verdict in its entirety. *Id.*, p. 1260.

> "He appeared to have ordered a new trial primarily because he was shocked at the size of the verdict. By so doing, the trial court invaded the province of the jury as the primary tier of fact. ***" (citations omitted) *Id.*

In this regard the Court of Appeals made the observation that the trial judge indicated his belief that liability was established - and that if he had any doubts about the liability issue he would have granted the defendants' motion for judgment notwithstanding the verdict.[23] *Id.*, p. 1259. The Court of Appeals properly noted that the district court unequivocally ruled that judgment n.o.v. was not appropriate "under any thinking or analysis". (Mandamus Opinion, p. 1259) Let us recall, also, that the district court had previously denied the motion for

---

[23]The only other conclusion which can be drawn from the trial judge's conduct of the case and his comments and rulings upon the motions and judgment n.o.v. is that the court recognized that if he had granted the motion for judgment n.o.v., as well as the new trial motion, the entire ruling would be subject to appeal, thus divesting him from further authority with respect to the case. This possibility is not inconsistent with the observation by the Court of Appeals that Judge Bohanon should not be in a position of advocacy, and is precluded from assuming any role in the development of the defendants' case. (Mandamus Opinion, p. 1258)

summary judgment as to liability and the motions for directed verdict during trial. Furthermore:

> "On the subject of liability, this is not a case in which the evidence to establish liability is vague and questionable. The evidence supported the conclusion that the several defendants engaged in a 'buccaneering' scheme designed to eliminate the plaintiff as a contender. To be sure, Diaflon's market share was relatively small, but the price manipulation and the timing lend itself to the interpretation that elimination of Diaflon was an object of the conspiracy. Defendants lowered their prices by 13%, thus foregoing substantial profits." (Mandamus Opinion, p. 1259).

Finally, it must be borne in mind that the Court of Appeals thoroughly reviewed the briefs of the parties in this case, those parts of the district court record which the parties designated in their briefs for the court's consideration, the narrative statements of the case and the arguments of counsel before it was determined, in the exercise of discretion, that the writ should issue to overturn the new trial order relating to the liability part of the verdict. As stated by this Court in *Kerr v. United States District Court for the Northern District of California, supra,* the issuance of the writ "***is in large part a matter of discretion with the court to which the petition is addressed." Dailfon respectfully submits that the Court of Appeals in this case properly exercised that discretion - giving full deference and the benefit of all doubt to the district court's decision. This is amply demonstrated by the Court of Appeals views with regard to the verdict on damages.

IV. THE DEFENDANTS' CONTENTION THAT THE COURT OF APPEALS FOR THE TENTH CIRCUIT HAS MADE FINDINGS AS TO THE ISSUE OF LIABILITY UPON AN INCOMPLETE RECORD IN PLAINLY WRONG.

At page 25 of the petition for certiorari the defendants state that "***the Court of Appeals proceeded to make factual findings on liability..." (Petition, p. 25, fn. 21) This is incorrect. The Court of Appeals merely found that the trial judge had no rational basis for granting a new trial other than the magnitude of the verdict. (Mandamus Opinion, pp. 1259-1260) Obviously, the Court of Appeals did not purport to (nor could it) determine that, as a final and unappealable matter, the defendants are liable to Diaflon for violation of the antitrust laws. The effect of the mandamus ruling is that the second trial will proceed on the issue of damages only, and following that trial all issues will be subject to review by the Court of Appeals in an appellate proceeding pursuant to the provisions of 28 U.S.C. §1291.

The defendants further contend that the Court of Appeals action in reinstating the jury verdict as to liability was improper in view of the fact that it did not have a full record before it. Two points are relevant here: (1) the defendants are apparently reacting to the fact that the Court of Appeals recognized, in the Mandamus Opinion, that the defendants wholly failed to comply with the order of the Court of Appeals with respect to the preparation of "***a narrative statement of the case along the lines provided by

Rule 10(d) of the Rules of Appellate Procedure." (App. "G", p. 180a) For whatever reason, the defendants elected to merely file an argumentative brief, which did not purport to summarize the evidence presented at trial;[24] (App. "I", p. 308a) and (2) the defendants, as Daiflon, had full opportunity to include in the narrative statement, or by way of attachment or supplementation to briefs filed, the portion or portions of the record deemed to be relevant in connection with the court's consideration of the petition for a writ of mandamus. The defendants' present complaint with regard to the sufficiency of the record for mandamus purposes is disingenous at best.

The defendants' contentions pertaining to the record considered by the Court of Appeals presume that the Court of Appeals undertook, in essence, a review of the evidence as it would in connection with the disposition of an appeal from a final judgment. The defendants, in advancing this position, apparently misapprehend the nature of the mandamus proceeding. The rulings and comments of the trial judge were examined, in view of the record presented, to determine whether the trial judge provided a rational basis, under applicable law, for vacation of the jury verdict in its entirety. The approach of the Court of Appeals was fully consonant with its responsibilities in connection with

---

[24] "The defendants' statement was relatively brief and had an argumentative tone and sought to answer petitioner's reply brief. Essentially, it was a brief and argument. Only the testimony of one witness was summarized, and that was not fully presented." (Mandamus Opinion, pp. 1251-1252)

the supervisory use of mandamus under the All Writs Act. The appellate remedies of all parties have been fully preserved.

V. THE DEFENDANTS' RELIANCE UPON THE POST-MANDAMUS ORDER OF THE DISTRICT COURT IS UNJUSTIFIABLE AND CONSTITUTES A MISUSE OF THE CERTIORARI PROCESS.

On April 7, 1980 the district judge voluntarily entered an order in which he withdrew from all further proceedings in the case and stated in writing his "response" to the Mandamus Opinion. (App. "M", p. 375a) Based upon that order the defendants moved for a "second rehearing" which was properly denied by the Court of Appeals for the Tenth Circuit. (App. "N", p. 379a) In the petition for certiorari, the defendants provided this Court with lengthy excerpts from the April 7 order, apparently in a belated effort to provide some basis — whether rational or not — for the district court's new trial order as to liability. Quite clearly, as the Court of Appeals recognized, there is no authority for such a procedure, and it should not be considered by this Court for any reason upon certiorari. The petition for a writ of mandamus named the trial judge as a respondent, and the trial judge elected not to appear in the case. Therefore, his post-mandamus order, as it relates to the propriety of the action taken on the post-trial motions, is a nullity.

CONCLUSION

The petitioners have not sustained their burden of establishing that there are special and important reasons why a writ of certiorari should be granted to review the judgment of the Court of Appeals for the Tenth Circuit. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Honorable Court; nor has the Court of Appeals decided a federal question in a way which conflicts with applciable decisions of this Court or of another Court of Appeals. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

B. HAYDEN CRAWFORD
1714 First National Bank Bldg.
Tulsa, Oklahoma 74103

JOEL L. WOHLGEMUTH
909 Kennedy Building
Tulsa, Oklahoma 74103

FRANK GREGORY
4107 South 72nd East Avenue
Tulsa, Oklahoma 74145

Attorneys for the Respondent,
Daiflon, Inc.

CERTIFICATE OF MAILING

I hereby certify that on the 29 day of July, 1980 I mailed a true and correct copy of the foregoing instrument to the following:

Mr. James M. Sturdivant
2010 Fourth National Bldg.
Tulsa, OK 74119

Mr. Coleman Hayes
1918 1st National Center West
Oklahoma City, OK 73102

Mr. Ben Burdick and
Mr. D. Kent Meyers
1700 Liberty Tower
Oklahoma City, OK 73102

Mr. Peter B. Bradford
100 Park Avenue Building
Oklahoma City, OK 73102

Mr. John Athens
2400 First National Bldg.
Tulsa, OK 74103

Mr. J. L. Weigand
830 1st National Bank Bldg.
Wichita, KS 67202

Mr. Herbert Dym
888 Sixteenth Street, N.W.
Washington, DC 20006

Mr. Henry Kolowrat
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102

Joel L. Wohlgemuth

Supreme Court, U. S.
FILED
AUG 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ALLIED CHEMICAL CORPORATION, ET AL.,
Petitioners,

v.

DAIFLON, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

---

REPLY MEMORANDUM FOR THE PETITIONERS

JOHN S. ATHENS
DOUGLAS L. INHOFE
CONNER, WINTERS, BALLAINE, BARRY & MCGOWEN
2400 First National Tower
Tulsa, Oklahoma 74104
(918) 586-5695
Attorneys for Petitioner Allied Chemical Corporation

COLEMAN HAYES
MONNET, HAYES, BULLIS, THOMPSON & EDWARDS
1719 First National Center West
Oklahoma City, Oklahoma 73102
(405) 232-5481

(List of counsel continued on inside cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

HERBERT DYM
JOHN P. RUPP
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000
Attorneys for Petitioner
E. I. du Pont de Nemours and Company

JAMES M. STURDIVANT
SIDNEY G. DUNAGAN
GABLE, GOTWALS, RUBIN,
FOX, JOHNSON & BAKER
2010 Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201
Attorneys for Petitioners
Kaiser Aluminum & Chemical Sales, Inc., and Kaiser Aluminum & Chemical Corporation

PETER B. BRADFORD
McAFEE & TAFT
Fifth Floor
100 Park Avenue
Oklahoma City, Oklahoma 73102
(405) 235-9621

HENRY KOLOWRAT
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania 19102
(213) 972-3483
Attorneys for Petitioner
Pennwalt Corporation

J. L. WEIGAND, JR.
CURFMAN, HARRIS & WEIGAND
830 First National Bank Building
Wichita, Kansas 67202
(316) 263-9111
Attorney for Petitioner
Racon Incorporated

D. KENT MEYERS
CROWE, DUNLEVY, THWEATT,
SWINFORD, JOHNSON & BURDICK
1700 Liberty Tower
100 Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700
Attorney for Petitioner
Union Carbide Corporation

TABLE OF AUTHORITIES

Page

CASES:

Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379 (1953) 4, 6

General Motors Corp. v. *Lord*, 488 F.2d 1096 (1973) .. 7

Kerr v. *United States District Court*, 426 U.S. 394 (1976) 3

La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957) ...4, 5, 6

National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) 5

Platt v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964) 2

Roche v. *Evaporated Milk Assn.*, 319 U.S. 21 (1943) .. 4

Schlangenhauf v. *Holder*, 379 U.S. 104 (1964)..... 4, 5, 6

Will v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978) 3, 4, 6

Will v. *United States*, 389 U.S. 90 (1967) 5, 6

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 35 ..... 5, 6

Rule 52(a) 2

MISCELLANEOUS:

5A Moore, *Federal Practice* § 52.08 (1979-80 Supp.).. 2

11 Wright & Miller, *Federal Practice and Procedure* (1973)

Section 2801 3

Section 2803 3

No. 79-1895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ALLIED CHEMICAL CORPORATION, ET AL.,
Petitioners,

v.

DAIFLON, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

---

REPLY MEMORANDUM FOR THE PETITIONERS

The court of appeals' use of mandamus to overturn the district court's new trial order does not involve the application of settled mandamus principles to the unique facts of this case, as respondent contends; it represents a drastic departure from those principles—a departure that has most damaging consequences for the administration of justice.

1. In respondent's view (Br. in Opp. 37), all that the court of appeals has done here is to hold that the district court failed to set forth sufficient reasons for having ordered a new trial as to liability and that the order, to that extent, involves a "clear abuse of discre-

tion" correctable on mandamus. Accepting this view does not make the court of appeals' decision more tenable or lessen the importance of review by this Court.

The court of appeals did not even attempt to reconcile its holding with Rule 52(a) of the Federal Rules of Civil Procedure, which provides clearly that a new trial motion is not one that requires any supporting findings of fact or conclusions of law. *See, e.g.,* 5A Moore, *Federal Practice* § 52.08 (1979-80 Supp.), and cases cited therein. Neither can the court of appeals' decision be reconciled with this Court's decision in *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U.S. 240 (1964), which is discussed at length in the petition (Pet. 26-27) but is not even cited in respondent's brief in opposition. *Platt* prohibits the courts of appeals from undertaking on mandamus a *de novo* examination of the record and exercising discretionary functions committed to the trial court. 376 U.S. at 245. This means that, at most, the court of appeals should have remanded this case to the district court. A remand would have permitted the district court to give a more complete statement of its reasons for ordering a new trial as to liability, and permitted that court to rule on the additional grounds for a new trial not addressed in the original new trial order. *See* Pet. 26 n. 23.

The writ issued by the court of appeals, which is not based on a factual record yet opines on the sufficiency of the liability evidence adduced by the plaintiff, can only add ambiguity and complexity to the further trial proceedings. For example, if the jury at the second trial finds damages, may the defendants then ask for a ruling on the liability issues raised in their original new trial motion ~~by~~ but not yet dealt with

by the district court? Further, if after having the benefit of a complete record of the first trial, the court of appeals concludes that the evidence is insufficient to establish liability, yet another trial will be needed.

It was because of problems such as these that Congress enacted the final judgment rule, and this Court steadfastly has required adherence to it. As this Court cautioned in *Kerr* v. *United States District Court,* 426 U.S. 394, 403 (1976), "[a] judicial readiness to issue a writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by [the] judgment of Congress" embodied in the final judgment rule. If permitted to stand, the court of appeals' decision in this case would, in effect, eviscerate the final judgment rule by inviting litigants to obtain immediate review of interlocutory orders (including new trial orders) by the simple expedient of casting their arguments in terms of an "abuse of discretion."

2. Respondent simply is in error in suggesting (Br. in Opp. 16-28) that this Court has endorsed use of an abuse of discretion standard on mandamus. There can be no doubt of the discretionary nature of the decision to award or deny a new trial, or that the court that presided over the taking of evidence is in a better position than an appellate court to weigh the issues raised by a new trial motion. *See, e.g.,* 11 Wright & Miller, *Federal Practice and Procedure* §§ 2801 and 2803 (1973), and cases cited therein. Respondent does not, and could not, contend otherwise. Only two Terms ago, Mr. Justice Rehnquist admonished in *Will* v. *Calvert Fire Insurance Co.,* 437 U.S. 655, 665-66 (1978) (plurality opinion), that "[w]here a matter is com-

mitted to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable' "—one of the essential prerequisites to issuance of the writ.

Respondent's reliance (Br. in Opp. 18-20) upon *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379 (1953), *La Buy* v. *Howes Leather Co.,* 352 U.S. 249 (1957), and *Schlangenhauf* v. *Holder,* 379 U.S. 104 (1964), to support use of an abuse of discretion standard on mandamus is misplaced. This Court refused in *Bankers Life* to permit mandamus to be used to review a severance and transfer order. In so doing, this Court noted that the district court had jurisdiction to enter the order, so that the order—"even if erroneous —* * * involved no abuse of judicial power [citing *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21 (1943)] * * *" (346 U.S. at 382). It is undisputed that the district court had jurisdiction to issue the new trial order challenged in this case; thus, it cannot be said that the order involves an "abuse of judicial power" (*Bankers Life & Casualty Co.* v. *Holland, supra*) or that the result requested by the plaintiff and granted by the court on mandamus is "clear and indisputable" (*Will* v. *Calvert Fire Insurance Co., supra*).

This Court approved issuance of a writ of mandamus in *La Buy* to halt respondent's repeated practice of referring cases to trial before a master. In view of the exceptional circumstances presented by the case, this Court concluded that the referral orders "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation" (352 U.S. at 256). Unlike *La Buy,* there can be no

claim here that the district court failed to exercise a judicial function within its jurisdiction.[1]

Finally in *Schlagenhauf* v. *Holder*, this Court held that the court of appeals had acted properly in entertaining a petition for a writ of mandamus "on a substantial allegation of usurpation of power in ordering [multiple physical and mental examinations] of a defendant, an issue of first impression that called for the construction and application of Rule 35 [of the Federal Rules of Civil Procedure] in a new context" (379 U.S. at 111). At the same time, however, this Court cautioned against the use of mandamus to consider

---

[1] In Will v. United States, 389 U.S. 90, 104 n. 14 (1967), this Court pointed out that *La Buy* "is simply inapposite where there is no showing of a persistent disregard of the federal rules." The court of appeals made no such finding in the present case.

Respondent suggests in its brief in opposition (pp. 4, 24, 30-31) that mandamus was appropriate here because of comments and actions by the district judge allegedly reflecting bias against respondent. These charges are particularly surprising in view ~~if~~ of the fact that, although similar charges appear in respondent's papers to the court of appeals, respondent's counsel expressly disavowed them during oral argument on the mandamus petition. The suggestion of bias is, moreover, completely unfounded.

The district court's statement in ordering a new trial that it would entertain a request for further discovery was for respondent's benefit—not petitioners'. Respondent had paid no attention during discovery to the difference between the authenticity of a document and its status as a business record. In the context of the new trial order, the suggestion of further discovery was simply an opportunity for respondent to patch up its record and get testimony it needed as a proper foundation for its documentary evidence. As for the 1974 dismissal of respondent's case, respondent implies that the unanswered interrogatory for which its case was dismissed was one important item among many. In fact, it was a key interrogatory to search out respondent's costs. This Court affirmed the dismissal of a case for failure to answer just such an interrogatory in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (per curiam).

"any future allegation that the District Court was in error in applying [the guidelines established by the Court] to a particular case * * *" (*id.* at 112).[2]

Thus, although the phrase "clear abuse of discretion" appears in this Court's opinions in *Bankers Life, La Buy* and *Schlagenhauf,* this Court has never approved issuance of a writ of mandamus on such a basis. Moreover, more recent opinions of the Court have cautioned the courts of appeals against being "misled by labels such as 'abuse of discretion' * * * into interlocutory review of nonappealable orders * * *" (*Will* v. *United States, supra,* 389 U.S. at 98 n. 6).[3] The time and resources that have been consumed by

---

[2] This Court stated in Will v. United States, *supra,* that although the majority opinion in *Schlagenhauf* "did note that the various questions concerning the construction of Rule 35 were new and substantial, * * * it rested the existence of mandamus jurisdiction squarely on the fact that there was real doubt whether the District Court had any power at all to order a defendant to submit to a physical examination" (389 U.S. at 105 n. 14). Again, no question has been or could be raised in the present case concerning the district court's jurisdiction to order a new trial.

[3] Respondent, like the court of appeals, has read this Court's decision in Will v. Calvert Fire Insurance Co., *supra,* as repudiating use of a "plain abuse of discretion" standard on mandamus. Br. in Opp. 27; Pet. App. A, p. 10a. Both go on, however, to assert that *Will* permits issuance of the writ to correct a "clear abuse of discretion." *Ibid.* Neither respondent nor the court of appeals has attempted to distinguish between a "clear" and "plain" abuse of discretion. Obviously, no rational distinction is possible. As the decision in this case makes all too apparent, if the courts of appeals are permitted on mandamus to search for possible error in discretionary determinations by trial courts, the courts will have little difficulty in characterizing any determination with which they disagree as involving either a "clear" or "plain" abuse of discretion. If that occurs, the decision in *Will* and other similar cases will have been deprived of any meaning, and the standard for review on mandamus will be identical to the standard appropriately used on direct appeal from a final order.

the present proceeding, the unattractiveness of permitting district courts to be transformed into litigants, and the confusion that has been caused by the court of appeals' order regarding the scope and nature of future proceedings in this case, graphically illustrate the dangers associated with use of an abuse of discretion standard on mandamus.[4]

3. Finally, even if this Court were disposed to permit courts of appeals routinely to overturn new trial orders on mandamus for asserted abuse of discretion, the court of appeals' application of that standard to this case is wholly unwarranted. In concluding that the district court abused its discretion in ordering a new trial as to liability, the court of appeals attached no significance whatsoever to the district court's finding that it had committed serious legal error in admitting exhibits into evidence. *See* Pet. App. A, pp. 27a-28a; *see also* Pet. 22. That finding is complete justification for a new trial on liability. If the court of appeals was troubled by the district court's failure to provide a comprehensive listing of the exhibits that had been admitted improperly, it could and should have remanded the case to the district court for a more complete statement of findings concerning the evidentiary errors that had occurred. Obviously, a detailed discussion of the sufficiency of the evidence, for the absence of which the court of appeals excoriated the trial judge, was quite unnecessary in light of the

---

[4] Respondent's efforts (Br. in Opp. 29-31) to minimize the square conflict between the Tenth Circuit's decision in this case and the Eighth Circuit's decision in General Motors Corp. v. Lord, 488 F.2d 1096 (1973), are unavailing. Respondent's allegations of bias by the district court reflect a win-at-all-costs attitude that disserves both respondent and the district court. *See* discussion at note 1, *supra; see also* Pet. 20.

latter's acknowledgement that there had been serious error in the admission of evidence on liability. *See* Pet. 22-23.

The court of appeals also improperly construed the district court's denial of defendants' motion for judgment n.o.v. as constituting an acknowledgement that the evidence established defendants' liability. Pet. App. A, p. 19a. The court thus ignored the fact that decidedly different standards apply to motions for judgment n.o.v. and for a new trial. *See* Pet. 26 n. 22. The court of appeals also substituted its own assessment of the evidence for the views of the district court, even though it did not have before it a single page of the trial transcript or more than a handful of the trial exhibits.[5] The direct result is a decision that ~~it~~ incontrovertibly in error on pivotally important issues of facts (*see* Pet. 25 n. 21), improperly invades the province of the trial court and undermines the orderly administration of justice.

In sum, if the grant or denial of a new trial is to remain a function of the trial court that has heard the evidence in its entirety, the writ issued by the court of appeals based upon incomplete knowledge of the evidence should be summarily reversed and this case

---

[5] Respondent's statement (Br. in Opp. 12 n. 10) that the defendants did not object to the court of appeals' reliance on "narrative" statements concerning liability, prepared independently by the parties, is in error. In the introduction to their "narrative" statement, defendants pointed out that the court of appeals could not properly consider liability issues on mandamus. Then, shortly after the "narrative" statements had been filed, defendants submitted a letter to the court of appeals objecting additionally to that court's reliance on anything less than a complete record (which was not then available because substantial portions of the trial proceedings had not been transcribed) as to liability.

should be remanded for a new trial, not only as to damages which will be necessary in any event, but also as to liability, as the trial court ordered.

Respectfully submitted.

JOHN S. ATHENS
DOUGLAS L. INHOFE
CONNER, WINTERS, BALLAINE,
BARRY & MCGOWEN
2400 First National Tower
Tulsa, Oklahoma 74104
(918) 586-5695
Attorneys for Petitioner
Allied Chemical Corporation

COLEMAN HAYES
MONNET, HAYES, BULLIS,
THOMPSON & EDWARDS
1719 First National Center West
Oklahoma City, Oklahoma 73102
(405) 232-5481

HERBERT DYM
JOHN P. RUPP
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000
Attorneys for Petitioner
E. I. du Pont de Nemours and Company

JAMES M. STURDIVANT
SIDNEY G. DUNAGAN
GABLE, GOTWALS, RUBIN,
FOX, JOHNSON & BAKER
2010 Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201
Attorneys for Petitioners
Kaiser Aluminum & Chemical Sales, Inc., and Kaiser Aluminum & Chemical Corporation

PETER B. BRADFORD
McAFEE & TAFT
Fifth Floor
100 Park Avenue
Oklahoma City, Oklahoma 73102
(405) 235-9621

HENRY KOLOWRAT
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania 19102
(213) 972-3483

Attorneys for Petitioner
Pennwalt Corporation

J. L. WEIGAND, JR.
CURFMAN, HARRIS & WEIGAND
830 First National Bank Building
Wichita, Kansas 67202
(316) 263-9111

Attorney for Petitioner
Racon Incorporated

D. KENT MEYERS
CROWE, DUNLEVY, THWEATT,
SWINFORD, JOHNSON & BURDICK
1700 Liberty Tower
100 Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Attorney for Petitioner
Union Carbide Corporation

August 1980